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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. 213.

MARMADUKE L. ENSMINGER, APPELLANT,

vs.

JOHN C. POWERS AND BRIDGET POWERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED APRIL 22, 1880.

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*a* In the Supreme Court of the United States, Oct. term, 1879.

MARMADUKE S. ENSMINGER, IMPLEADED, &C., appellant,
*vs.*
JOHN C. POWERS & BRIDGET POWERS, APPELLEES.

Appeal from the circuit court of the United States for the western district of Tennessee.

And now on this 22nd day of April, A. D. 1880, comes the said Marmaduke S. Ensminger by Wm. B. Gilbert, his solicitor, and enters his appearance in the said Supreme Court in the above cause.

MARMADUKE S. ENSMINGER,
By WM. B. GILBERT, *his Solicitor,*

WM. B. GILBERT,
*Solicitor for Appellant, Cairo, Ills.*

*b* UNITED STATES OF AMERICA,
*Western District of Tennessee:*

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its May term, A. D. 1876, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 9th day of Sept., A. D. 1876, in the following cause, to wit:

JOHN C. POWERS AND BRIDGET POWERS, PLAINTIFF,
*vs.*
M. L. ENSMINGER, J. J. SEARS, AND THE CITY OF MEMPHIS, DEFENDANT.
No. 267.

1 In the circuit court of the United States for the western district of Tennessee. In equity.

To the judges of the court:

JOHN C. POWERS AND BRIDGET, HIS WIFE, WHO are citizens of the State of Tennessee,
*against*
MARMADUKE L. ENSMINGER, WHO IS A CITIZEN of the State of Illinois, J. J. Sears, who is a citizen of the State of Tennessee, and The City of Memphis, a municipal corporation and a citizen of the State of Tennessee.

The plaintiffs state and show—

That they are husband and wife, having been married about the 14th

day of September, 1862, and are, and for many years have been, citizens of the State of Tennessee.

2 The defendant Marmaduke L. Ensminger, as they are informed, is a citizen of the State of Illinois; the defendant J. J. Sears, who professes to be or to act as the agent in the matters hereafter stated of the said Ensminger, is a citizen of Shelby County, Tennessee, and The City of Memphis is a municipal corporation, and a citizen of the State of Tennessee.

The plaintiffs further state and show that the original proprietors of the ground whereon the city of Memphis stands, or at least the principal part of it, in contemplation of the building of a town or city thereon, dedicated and set apart the grounds lying between the western boundary of the lots from No. 1 to 24, inclusive, and the same line continued in a direct course to the south bank of Gayoso and the eastern margin of Wolf and Mississippi Rivers, and between Jackson street, extended to

3 the river, and the south bank of the bayou, as and for a landing or landings for public purposes of navigation or trade, and that the same should be forever enjoyed for those purposes, obligatory on themselves, their heirs, and assigns.

A deed confirmatory of the said dedication is of record in the office of the register of Shelby County, made by the said original proprietors, dated 18th September, 1828, and a copy will be filed with and as a part of this

Ex. A. bill and marked Exhibit A.

The public, which has since been and now is represented by the municipal corporation now styled The City of Memphis, a defendant hereto, accepted the said dedication, and the said original proprietors have ever since acquiesced in the same, and thereby the said dedication has become and is complete, and the said land and premises have become and are invested in the public in fee, in accordance therewith.

4 The plaintiffs further state and show that The City of Memphis without lawful authority, as they insist, about the year 1844, attempted to convey to the United States of America the said above-described land and premises in fee for the purpose of enabling the United States to establish and maintain thereon a navy-yard or depot for naval supplies.

Afterwards the United States took possession of the said land so conveyed, erected buildings and improvements thereon, and established and for some years maintained a navy-yard.

About the 5th day of August, 1854, the United States having determined to discontinue the said navy-yard, the Congress of the United States by a public act ceded to The City of Memphis "for the use and benefit of said city" the said navy-yard, including the grounds and the appurtenances, and since then has had no claim thereto.

5 The plaintiffs are advised that the said conveyance to the United States and the said retrocession by the United States had no effect in the title to the said ground so dedicated by the original proprietors for a public landing, and that the public, after the 5th day of August, 1854, had precisely the same title to the said ground, and held it for precisely the same purposes as before the said date, and as before the making of the deed by The City of Memphis to the United States.

After the cession of its title by the United States, The City of Memphis had the said navy-yard grounds laid off into lots, and caused a map or plot

thereof to be made, and to be put of record in the office of the register of Shelby County, where it now remains.

6 The said grounds, or much of them, not being necessary for the purposes of the dedication, The City of Memphis made leases of portions thereof from time to time to various parties.

Amongst others, on the 28th day of February, 1866, it made a lease in writing, now of record in the office of the register of Shelby County, a copy of which will be filed with and as a part of this bill, and marked Ex. B. Exhibit B, the original being held subject to the order of the court, whereby it let and demised to the plaintiff Bridget Powers, for the term from the said 28th day of February, 1866, to the 31st day of December, 1886, lot ten (10), beginning at the northeast corner of lot No. 9, running thence north and parallel with Chicasaw street fifty-five (55) feet and $\frac{31}{100}$ to the southeast corner of lot No. 11; thence running west one hundred and seventy (170) feet to Promenade street; thence running south

7 and parallel with Promenade street fifty-five (55) feet and $\frac{31}{100}$ to the northwest corner of lot No. 9, and thence running east one hundred and seventy (170) feet to the point of beginning, being a lot on the plan of the said subdivision of the said navy-yard property, and being a part of the said ground so designated, as aforesaid, as and for a public landing or landings.

For the said lease the said plaintiff agreed to pay a yearly rent of one hundred and twenty-seven $\frac{12}{100}$ dollars for each and every year of the lease, divided into half yearly payments, falling due on the 15th days of June and December in each year.

For the particulars of the said lease reference is here made to the same.

When the said lease was so made the said ground had no buildings or improvements whatever thereon, but was vacant and unoccupied, and it

8 was contemplated and was understood and agreed between The City of Memphis and the plaintiff Bridget that she would and should erect thereon lasting and valuable improvements, and should have and enjoy the same during the term of her lease, and at the end thereof should have the right unmolested to remove the same as her own property.

And The City of Memphis covenanted and agreed with the plaintiff Bridget that she should at all times during the said term peac'ably and quietly have, hold, and enjoy the said demised premises for and during the term of years thereby granted, without any manner of let, hinderance, suit, or trouble from The City of Memphis, its successors, or any person or persons whomsoever lawfully claiming by, from, or under them, or any of them.

The plaintiffs have been in undisturbed use and possession of the said

9 premises so leased the plaintiff Bridget from the date of the lease till within a few weeks, when, as will be more fully shown, the defendants Ensminger and Sears, or one of them, wrongfully and unlawfully dispossessed them thereof, and compelled the plaintiff John C. Powers to take a lease from him thereof in order to avoid being turned out. The said lease will be produced on the hearing, and filed and made Ex. C. part of this bill, marked Exhibit C.

The said Ensminger or Sears also required and compelled the plaintiff John C., as a condition of remaining in the said premises, to execute to

him his five (5) notes, each for the sum of twenty-five (25) dollars, for the rent of the same for five (5) months from the 19th day of July, 1876. The plaintiff John C. has paid one (1) of the said notes; the others remain unpaid, and the plaintiffs pray that the said *said* Sears and Ensminger may be required to produce them for the purposes of this suit.

10 The plaintiffs further state and show that the plaintiff Bridget, after having so leased the said premises, proceeded to build thereon houses and valuable improvements of a substantial character, at a cost to her of nine or ten thousand dollars, and such houses and improvements are and remain upon the said premises. The said Bridget invested in the said lease and improvements a very large part of what she possessed, the same being intended for her home, and she and her husband have since made their home there.

When the said lease was made the plaintiffs had no knowledge or notice of any adverse claim in favor of the said Ensminger, or any one else, to the said premises, but were assured that the title of the city was perfect, and that its right to make the said lease was unquestioned.

They were assured to the above effect by the officers and agents of The City of Memphis, by whom the said lease was agreed upon

11 and executed.

After the said lease was made, and the plaintiffs were in possession, and had constructed much the larger part of their houses and buildings, as before stated, they were informed that the said Ensminger asserted some claim to the said premises.

Upon enquiry they ascertained that the said Ensminger claimed that he had purchased the same of the United States district tax commissioners, for unpaid taxes, under the act of Congress for the collection of direct taxes in insurrectionary districts within the United States, at a sale made by them at Memphis, on the 24th day of June, 1864, and that he had their certificate showing the fact. They further ascertained that the said Ensminger, or Sears as his agent, had caused the said direct tax commissioners to issue a writ of possession, directed to the marshal of the United States for the district of West Tennessee, which was then in his

12 hands, under which they claimed they had the right, and threatened that they would proceed at once to dispossess the plaintiffs of the said lot, and cause possession to be delivered to themselves.

Being the lessees of the city, the plaintiff John C. then applied to the city attorney, as the city's representative, to protect the plaintiffs in the possession and use of the said property, as the city was bound to do, and the city attorney thereupon, on the 10th day of June, 1867, filed in this court a bill against the said Ensminger and Sears, the object of which was to have the pretended claim of title of the said Ensminger cancelled, and to enjoin the said Sears and Ensminger from disturbing or interfering with the possession or enjoyment of the said lot.

The city attorney named the plaintiff Bridget as a party plaintiff in the said suit, but for what reason the plaintiffs do not know, as it was

13 really and exclusively the suit of the city; but he did not name the plaintiff John C. as a party thereto, either plaintiff or defendant.

The said Sears, though served with process, did not answer the said bill for himself, but did file an answer, not sworn to by the defendant Ensminger, but sworn to by the defendant Sears on his behalf, for the said

Ensminger, although in fact the said Ensminger was never served with process or brought before the said court.

In the answer so filed on behalf of the said Ensminger the said lot is claimed as belonging to him under the said purchase from the United States direct tax commissioners, and the certificate granted is made a part of the answer. No other source of title is relied upon. No cross-bill was filed by the said Ensminger or the said Sears, according to the practice of the court, nor was the said answer made a cross-bill, nor was any affirmative relief prayed in the said answer.

14 No replication appears to have been filed to the said answer, but some proof was taken, and the parties appear to have treated and considered the cause as at issue.

Some proof appears to have been taken on the part of the plaintiffs in the suit, but none on the part of the defendants.

On the 20th day of December, 1873, as the plaintiffs are informed and believe, the plaintiffs in the said suit were in court here by their solicitors ready for and insisting upon a hearing of the said cause. The honorable Connally F. Trigg, judge, *and* was presiding on that day.

The counsel for the defendants stated to the court that the Hon. H. H. Emmons, judge, &c., who was not then in court, or in the State of Tennessee, but had lately been holding the court, at the same term, had instructed him to enter decrees in the series of causes in the court known as the "United States tax title cases" in all such cases as fell within

15 the purview of the decision of Judge Emmons, rendered before that time in certain of those cases; and that such decrees were to be entered in those cases which the said counsel thought came within the said decision of Judge Emmons; but to be entered at the peril of the parties, because Judge Emmons would, upon a bill of review, set aside said decrees if it appeared to him by such bill of review that the case did not properly fall within his said decision. The counsel of the said defendants then stated and insisted that the said case was one proper for a decree under Judge Emmons' direction, and that he (the counsel) was the exclusive judge of that fact, subject to the right of the plaintiffs to a bill of review.

The counsel for the said plaintiffs (the city's attorney) objected to the entering of the decree proposed, and stated that the case was different from those Judge Emmons had decided, and did not come within his direction and insisted that the plaintiffs were prepared and ready for a hear-

16 ing of the case, and that it should be heard, or at least that Judge Trigg should determine the question whether or not it was proper to enter a decree for the defendants under Judge Emmons' directions. Judge Trigg then stated that he did not know what Judge Emmons' decision was, nor the scope of it; that he had promised Judge Emmons to have entered decrees in such cases as fell within his decision, and that he understood it was left to counsel for the defendants to determine which were such cases, and that he would enter decrees in those cases that the said counsel should designate, with the understanding that the said proceedings were at his peril.

The court thereupon permitted the counsel for the defendants to enter a decree for them, declaring their title to the said lot as acquired by the purchase from the direct tax commissioners to be good, dismissing the

17 bill of the plaintiffs, ordering a writ of possession to put the said

defendants in possession of the said lot, and directing a reference to the clerk to take and state an account of the damages the defendant had sustained by the suing out of the injunction.

To the said action of the court the plaintiffs at the time excepted and tendered their bill of exceptions in respect of all the said matters, and the same being found correct, was signed by Judge Trigg, and signed and ordered to be filed and to form a part of the record of the cause.

Afterwards, the plaintiffs in the said suit prayed an appeal from the said decree to the Supreme Court of the United States, and gave the required bond, and the said appeal was granted and otherwise perfected, and the transcript of the cause was made out and was sent to the clerk of the Supreme Court of the United States, and was received by him; but the City of Memphis and its mayor, John Loague, esq., refused to pay
18 the money required by the rules of the Supreme Court of the United States as a condition precedent to the filing of the transcript and docketing the appeal.

And consequently the said appeal was dismissed for the failure of the said transcript within the proper time.

Thereupon the Supreme Court remanded the said cause to this court, to the end that the decree aforesaid might be carried into effect. Upon the filing of the said mandate this court, on the 19th day of June, 1876, entered a decree, substantially the same as the decree first entered, dismissing the said bill, adjudging the title of the defendants to be good, awarding a writ of possession to put them in possession, and directing a reference to the clerk to ascertain the defendants' damages by reason of the suing out of the injunction.

Afterwards, on the 8th day of July, 1876, a writ of possession was issued under the said decree, and the same came to the hands of
19 the marshal of the United States for the western district of Tennessee, and on the 19th day of July, 1876, the marshal was proceeding to turn the plaintiffs out of the possession of the said premises, and to put the said Ensminger and Sears therein, when the plaintiff John C., in order to prevent his doing so, accepted the lease and gave notes, as hereinbefore stated.

The plaintiffs are still in the possession of the said premises.

The plaintiffs state and show that the plaintiff Bridget was a married woman when the said bill was filed, and has continued to be such ever since, and the wife of the plaintiff John C., and her husband, John C., was not a party to the said suit, either as plaintiff or as defendant, and therefore, as the plaintiffs are advised and submit, the said decree and proceedings in the said suit were in no wise and to no extent binding on the plaintiffs, or either of them, but were and are as to each of them void to all in-
20 tents and purposes.

The plaintiffs have applied repeatedly to the City of Memphis, through its mayor and city attorney, and have asked and insisted that some action be taken, by a bill of review, or otherwise, to relieve the plaintiffs from the position in which they are placed by the said decree and proceedings, but not only has the city refused to take any action, but it has denied, through its city attorney, its obligation to keep the plaintiffs in the use, possession, and enjoyment of the said leased premises under the said lease, and its liability to pay the plaintiffs damages for failing to do so. And

further, by evidencing its disposition toward the plaintiffs, the City of Memphis, by its mayor and the city attorney, on the 26th July, 1876, about three or four days after the plaintiffs had been compelled to take the lease from the said Ensminger and Sears in order to prevent being put out of possession by the United States marshal, as hereinbefore more fully
21 stated, served the plaintiffs with a notice, dated on the 24th July, 1876, that it held the said lease terminated and forfeited, and that it thereby declared a forfeiture and determination of the said lease, because of a breach on the part of the plaintiffs of the terms, conditions, and agreements of the said lease.

The particular causes of the pretended forfeiture were not stated in the said notice, and have never been stated to the plaintiffs.

The said notice will be filed with and as a part of this bill, and marked
Ex. D Exhibit D.

The plaintiffs state and show that they have always paid the rent, according to the terms of the said lease, and have complied with and performed the other covenants and conditions on their part to be performed, contained in the said lease.

They have not paid rent since the 15th June, 1875, because the agent of the City of Memphis appointed to collect it refused to receive such rent.

All the rent before that time was punctually paid. No objection
22 was ever made to the manner in which the plaintiffs kept their part of the said lease, nor any notice given of any intention to forfeit or terminate the same, until the said notice was so given on the 26th July, 1876, as before stated, at which time, as already alleged, the plaintiffs had been dispos'essed by the marshal and the said Ensminger and Sears, in the manner already stated.

Under these circumstances the plaintiffs have been compelled to take action to protect themselves.

The plaintiffs further state and show that they are informed and believe that the decrees aforesaid pronounced by this court in the said suit, so far as they undertook to decree the validity of the title of the defendant Ensminger to the said premises, or to award a writ of possession to put him or the said Sears in possession thereof, or to do anything more than dismiss the bill of the plaintiffs, violated and departed from the established practice of the court, and were therefore void, or at least erroneous.
23 And the plaintiffs claim and insist that it was wholly improper that a writ of possession should be issued under the said decree to put them out of possession of the premises; and as the same has not been done in the manner hereinbefore stated, that it is the duty of the court here, by the proper orders and decrees, to put and protect them in the positions they rightfully occupied before the said decrees were rendered.

The plaintiffs now here refer to the record and proceedings in the said suit remaining in court here, and pray that the same may be taken and considered as a part of this their bill.

The plaintiffs are further informed and believe and charge that the said cause was not, at the time the said decree was so entered in it, as will fully appear by the said proceedings at issue, *or* ready for hearing, and that the said decree was for that reason, as well as because it was not the
24 deliberate judgment of the court upon the facts in the record, erroneous, if not void.

And the plaintiffs further charge, from information and belief, that the said Ensminger has no title to the said premises, his pretended purchase of them from the United States direct tax commissioners being void, and communicating no title for the following, among other reasons:

The said premises were not subject to taxation, because, as before shown, they were a part of the public landing or landings, dedicated as aforesaid, and belonging to the public, and therefore not subject to taxation by the United States.

Second. Because the description under which the said Ensminger claims the said premises were assessed for taxation, and were advertised for sale, and were sold, and by which they are described in the certificate of sale is so defective, indefinite, and insufficient that no title or interest
25 in the said premises was really sold or passed.

Third. Because, as has been decided by the supreme court of the State of Tennessee, at the time the said property was assessed for taxation, was advertised for sale, and was sold, as claimed by the said Ensminger, the authority of the United States had not been established, as was contemplated by the said act of Congress, throughout the county of Shelby; but the late rebellion was flagrant, and the greater part of the said county was in the possession, or was under the control of the rebels in arms against the United States.

Fourth. Because the said direct tax commissioners made an excessive assessment of taxes upon the said property, and sold the same for the payment thereof in this, that taxation was authorized by the acts of Congress, as the plaintiffs are informed and believe, at about the rate of 27½
26 cents on the hundred dollars in value of the said property, not including the penalty of fifty per centum which was to be added, whereas in fact it was fixed at about the rate of 35 cents on the one hundred dollars of the value of the said property, to which the said penalty of fifty per centum was added.

Fifth. Because the said property was never advertised for sale by the said direct tax commissioners, in the manner and for the time prescribed by law.

The plaintiffs further state and show that they are informed and believe that the military forces of the United States, in the year 1864, when the said sale was so made, were in the actual possession and occupation of the said premises, and excluded the owners therefrom; and that for that reason the said sale to the said Ensminger ought to be set aside.

These plaintiffs further state and show that, in the year 1861,
27 and from thence up to the date of the lease aforesaid, the said premises were not and had not been leased by the City of Memphis to any one, or, if any such lease had been made, the same had been abandoned and forfeited, and was not for any part or period of the said time in force, or subsisting as a valid and effectual contract.

The plaintiffs further state and show that by a special act of the general assembly of the State of Tennessee, in force in the year 1861, the said premises were not taxable by the State of Tennessee, or the United States of America, the same not being under a lease from the city, and, for that reason, that the said sale was void.

And the plaintiffs further state and show that the title to the said premises in the year 1861, and before and since that time, was in the City

of Memphis, which held the same as public property, for muni-
28 cipal or public purposes, as prescribed by law, and therefore, by the law of the State of Tennessee the said premises were not in the year 1861, or before or since, liable to a direct tax by the Government of the United States, and for that reason that the said sale was void.

On the 3rd day of August, 1867, the plaintiffs, with the consent and acquiescence of the City of Memphis, sold and assigned and confirmed to John McMahon the one-fourth part, being the northwest [east] quarter of the said leased premises, fronting 27½ feet on Front street, and running back in parallel lines 85 feet, and therein covenanted that the said premises were free from encumbrances, that they had a good right to sell the same, and that they would warrant and defend the title to the same to the said McMahon, his heirs and assigns, against the lawful claims and interest of all persons whomsoever. A copy of the instrument making the said conveyance is made a part of this bill, and will be filed on or before
29 Ex. E. the hearing and marked Exhibit E.

The plaintiffs are advised and believe that the said conveyance is immaterial for the purposes of this suit, because of the covenants on their part contained in the said conveyance, and because, also, the said conveyance was made pending the suit aforesaid in this court.

The plaintiffs have requested the said Sears, as the agent of the said Ensminger to pay for the valuable improvements that they have placed or caused to be placed on the said premises, or to allow them to have the benefit thereof, but the said Sears, as such agent, has refused and refuses so to do, and claims and insists that the same belong absolutely to the said Ensminger, and that he alone is entitled to the enjoyment thereof.

The plaintiffs further state and show that the said Ensminger is a non-resident of the State of Tennessee, and the said Sears is wholly
30 irresponsible, and cannot make good to the plaintiffs the rents they may be compelled to pay him, or the damages they may sustain by reason of the wrongfully seizing, taking possession of, and detaining the said premises as aforesaid.

The plaintiffs are advised and believe, upon the facts aforesaid that the plaintiffs, or the plaintiff Bridget, have a good title to the said premises for the term of the said lease, and subject to the conditions thereof, and that the said Ensminger and the said Sears have no title thereto; but if they are mistaken in that, then they claim and insist that the said Ensminger or Sears must pay them the value of the said buildings and improvements, inasmuch as they placed them upon the said leased ground without any knowledge or notice of the claim or title of the said Ensminger and Sears; or further, if they are mistaken in the claims already made, then they claim and in-
31 sist that the City of Memphis, is legally bound to make good or pay to them the value of their said buildings and improvements, and of their said lease.

In consideration of the premises, the plaintiffs pray that the parties named in the caption as such, may be made defendants, and may be brought in by proper process, and required to answer this bill; that on the final hearing, it may be decreed that the plaintiffs or the plaintiff Bridget, have a good and indefeasible right for the term of the said lease, and subject to the conditions thereof, to the said leased premises; that the pretended sale to the said Ensminger, by the said direct tax commissioners, and the certificate of

purchase granted by them to him, may be cancelled and declared void; that the decrees of this court pronounced as aforesaid, in the year 1873, and in 1876, respectively, may be revised, reviewed, and set aside, so far as they may conflict with or may be in the way of the relief herein
32 prayed; that the said Ensminger and the said Sears, and their agents and attorneys, may be enjoined, by the order of the court here, from collecting rent for the said premises from the plaintiffs, or either of them, and from interfering with their possession or control of the same, and from collecting, assigning, or in any way disposing of the notes given as aforesaid by the plaintiff John C., for the said rent; that the said notes, and the lease given by the said Ensminger and Sears, to the plaintiff John C., may be set aside, vacated, and cancelled; that the proper accounts may be taken to ascertain the sums due; and that the plaintiffs may have all other just, proper, and necessary relief.

And as in duty, &c.

RANDOLPH, HAMMOND & JORDAN,
*Sol's for Pl'ffs.*

We, John C. Powers, and Bridget, his wife, plaintiffs in the foregoing bill, do state on oath that the matters thereof, so far as stated of
33 our own knowledge are true, and so far as stated from information and belief the same to be true.

BRIDGET POWERS.

Subscribed and sworn to before me this 9th day of September, A. D. 1876.

H. E. ANDREWS, *Clerk.*

(Endorsed:) No. 267. Circuit court of the United States, western district of Tennessee. John C. Powers and Bridget Powers, vs. M. L. Ensminger, J. J. Sears, and The City of Memphis. Bill of complaint. Filed Sept. 9th, 1876. H. E. Andrews, clerk. Randolph, H. & J., att'ys.

34 Ex. A.

The undersigned, proprietors of the land on which the town of Memphis has been laid off, having been informed that doubts have arisen in relation to their original intentions concerning the same, for the purpose of removing such doubts do hereby make known and declare the following as their original and unequivocal designs and intentions in relation thereto:

Article 1st. All the ground laid off in said town as streets or alleys we do say that it was always our intention that the same should forever remain as public streets and alleys, subject to the same rules and regulations as all streets and alleys in towns or cities, forever obligatory on ourselves, heirs, or assigns. And by these presents we do bind ourselves, our heirs, &c., that the above streets and alleys shall continue eastwardly as far as the lots are laid off, and the streets, tho' not the alleys, as far east as Bayou Gayoso, agreeably to the last survey and sale.

Second. In relation to the ground laid off in said town as public
35 squares, viz., Court, Exchange, Market, and Auction squares, it was the intention of the proprietors they should forever remain as

public grounds, not subject to private appropriation, but public uses only, according to the import of the above expressions, Court, Exchange, Market, and Auction squares.

Thirdly. In relation to the piece of ground laid off and call' the Promenade, said proprietors say that it was their original intention, is now, and forever will be, that the same shall be public ground for such use only as the word imports, to which heretofore by their acts for that purpose it was conceived all right was relinquished for themselves, their heirs, &c.; and it is hereby expressly declared in conformity with such intention that we, for ourselves, heirs, and assigns forever relinquish all claims to the same piece of ground called the Promenade for the purpose above mentioned. But nothing herein contained shall bar the town from authorizing one or more ferries to be kept by the proprietors, their heirs or assigns,
36 opposite said promenade and the mouths of any of the cross-streets on Mississippi Row.

Fourthly. In relation to the ground lying between the western boundary line of lots from No. 1 to 24 inclusive, and the same line continued in a direct course to the south bank of Bayou Gayoso and the eastern margin of Wolf and Mississippi Rivers and between Jackson street extended to the river and the said south bank of the bayou, it was the original intention of the proprietors that there should on said grounds forever be a landing or landings for public purposes of navigation or trade, and that the same should be forever enjoyed for those purposes, obligatory on ourselves, heirs, and assigns; but all other rights not inconsistent with the above public rights incident to the soil it never was the intention of the proprietors to part with, such as keeping a ferry or ferries on any of the public grounds, an exclusive right to which they always held sacred and never intended to be parted with in whole or in part.

37 Fifthly. The first block of ground lying east of lots Nos. 329 and 330 and north of Poplar street, being 148½ feet square, having heretofore been used as a public burying place, the same is hereby given, granted, and conveyed forever to the town of Memphis, provided the practice of burying henceforward cease thereon.

Sixthly. Inasmuch as they have been advised that it is the general wish of the citizens of the town that the public burying place be removed out of the town, and being applied to by the corporation of Memphis for the purchase of four acres of ground on the Second Bayou for a burying ground, in consideration of the desire to furnish said town of Memphis, which its wants, whether natural, sacred, or commercial, may require, they do hereby give, grant, bargain, and sell forever to the citizens of the town of Memphis, and all their heirs and assigns forever, for a public burying ground, subject to such regulations as to them may
38 appear requisite, the following described lot of ground, viz: Beginning at a black gum, on the south bank of the Second Bayou; thence south 12° east, twenty poles, seven and a half links, to a stake with a white oak and a black oak pointers; thence south 78° west, thirty poles to a stake with a black gum pointer; thence north 12° west, twenty poles, 7½ links, to a black oak on the bank of the bayou, a gum and beech pointers, near the mouth of a small ravine; thence up the south bank of the Second Bayou to the beginning—containing four acres, and including the present burying ground; and they further declare and acknowledge that there

shall forever be kept open a right of way, not less than twenty feet wide, from some point on the Alabama road as it now runs opposite to the graveyard, directly to it.

In witness whereof we have hereunto set our hands and seals,
39 this 18th day of September, 1828.

JOHN OVERTON, [SEAL.]
*One of the Proprietors.*
JNO. C. McLEMORE. [SEAL.]
GEORGE WINCHESTER. [SEAL.]
WILLIAM WINCHESTER, [SEAL.]
*Surviving Owner,*
By M. B. WINCHESTER,
*Special Agent and Atto' in fact.*

Witness:
RICHARD S. WILLIAMS.
WILLIAM LAURENCE.
M. B. WINCHESTER, Witness to 2 part's names.

STATE OF TENNESSEE,
*Shelby County:*

Circuit court, Decem'r term, 1828.

When was produced in open court the within grant, &c., from the proprietors of Memphis to the citizens of said town, and proved to be the act and deed of John Overton and John C. McLemore, for the purposes therein contained, by the oaths of Wm. Laurence and M. B. Winchester, subscribing witnesses thereto, and acknowledged on the part of Geo. Winchester and Wm. Winchester to be their act and deed, by M. B. Winchester, their attorney in fact, and ordered to be so certified.

Test:

S. R. BROWN,
*Clerk pro tem.*

40 STATE OF TENNESSEE,
*Shelby County:*

REGISTER'S OFFICE, *March 4th*, 1829.

This grant, &c., was this day, with the certificate thereon endorsed, duly and truly recorded in the said office in book B, folio 171, 172, and 173.

Test:

M. B. WINCHESTER, *R. S. C.*

Proprietors, &c., to City of Memphis—Grant, &c.

STATE OF TENNESSE,
*Shelby County:*

I, H. W. Griebel, register of said county, hereby certify the enclosed 6 pages to be a full, true, and perfect copy from the records of my office of a grant, &c., from proprietors, &c., to City of Memphis of record in book No. B, page 171.

Witness my official signature and seal at office this 16th day of Oct., 1877.

H. W. GRIEBEL, *Register.*

Paid by, for Randolph, fee, $1.75.

J. V. SAVAGE.

41 [U. S. internal revenue stamp, 1 dollar.]

This indenture, made and entered into this twenty-eighth day of February, one thousand eight hundred and sixty-six, between the Mayor and Aldermen of the City of Memphis, parties of the first part, and Bridget Powers, party of the second part.

Witnesseth, that the said parties of the first part, for and in consideration of the rents, covenants, and agreements hereinafter mentioned, reserved, and contained, on the part and in behalf of the said party of the second part, her executors, administrators, and assigns to be paid, kept, and performed, have granted, demised, and to farm letten, and by these presents do grant, demise, and to farm let unto the said party of the second part, her executors, administrators, and assigns a certain parcel of ground situate and lying in said City of Memphis, being a portion of the
42 navy-yard property, ceded by the general government to the City of Memphis, and described as follows, to wit:

Lot No. ten (10), beginning at the northeast corner of lot No. nine (9), running north and parallel with Chicasaw street, fifty-five and thirty-one hundredths (55.31) feet to the southeast corner of lot No. eleven (11), thence running west one hundred and seventy (170) feet to Promenade street, thence running south and parallel with Promenade street fifty-five and thirty-one hundredths (55.31) feet to the northeast corner of lot No. nine (9), thence running east one hundred and seventy (170) feet to the point of beginning.

To have and to hold the said above-mentioned and described premises, with the appurtenances, unto the said party of the second part, her executors and assigns, from the date hereof until the thirty-first (31st) day of December, one thousand eight hundred and eighty-six, being for the term of years, months,
43 days next ensuing from the date hereof and fully to be complete and ended; yielding and paying therefor unto the said parties of the first part, or their successors in office, yearly, and every year during said term hereby granted, the yearly rent or sum of one hundred and twenty-seven dollars & nineteen cents, ($127.19) lawful money of the United States, in payments, to wit: On the 15th June, 1866, the sum of $31.90, and on the 15th December, 1866, $63.59, and the further sum of $63.59, semi-annually thereafter on the 15th day of June and the 15th day December, during each and every year of this lease, on each and every of said years; provided always, nevertheless, that if the yearly rent above reserved, or any part thereof, shall be behind or unpaid for the space of twenty days next after any of the days of payment, whenever the same ought to be paid as aforesaid, it being first lawfully de-
44 manded; or if default shall be made in any of the covenants herein contained, on the part and behalf of the said party of the second part, her executors, administrators, and assigns, to be paid, kept, and performed, then and from henceforth it shall and may be lawful for the said

parties of the first part, or their successors in office, into and upon the said demised premises, and every part hereof, wholly to re-enter, and the same to have again, repossess and enjoy as in or their first and former estate, together with all the permanent improvements or fixtures thereon made and erected; and that from and after such re-entry made, this lease and everything herein contained shall determine and be utterly void to all intents and purposes; and also in the event of the said rent remaining due and unpaid in manner aforesaid, it is agreed between the said parties to this indenture, that a lien on all the improvements, machinery, or other
45 personal property which may be made, erected, or to be, on the herein demised premises, is reserved to the said parties of the first part, and fully acquiesced in and assented to by the party of the second part; the said lien to be and remain upon said improvements, machinery, and personal property, from the day upon which default shall be made in the payment of any of the rent heretofore mentioned, and to this end and to secure the payment of the rent aforesaid, E. De F. Morgan, city attorney, is hereby appointed a trustee, and upon default being made in any of the payments of the rent, then the said E. De F. Morgan, city attorney, is hereby invested with full power, right, and title in and to such improvements, machinery, and personal property as may have been placed or erected, or to be on the within demised premises, and shall, after giving twenty
46 days' notice, in some newspaper in the city of Memphis, proceed to sell so much of said improvements, machinery and personal property as may be necessary to pay and satisfy all arrearages of rent, and the expenses attending the collection of the same, under the provisions of this deed.

And the said party of the second part, for herself, heirs, executors, and administrators, doth covenant and agree to and with the said parties of the first part or their successors in office, that he or they shall and will, during every year of the said term hereby granted, well and truly pay or cause to be paid unto the said parties of the first part or their successors in office the said yearly rent above reserved, on the days and in the manner limited and prescribed as aforesaid, for the payment thereof, without any deduction, fraud, or delay, according to the true intent and meaning of these presents.

47 And also that the said Bridget Powers shall and will pay or cause to be paid all taxes, assessments and impositions whatsoever, which at any time during the continuance of said term shall or may be assessed or imposed on the said premises or any part thereof.

And also that the said Bridget Powers, her executors, administrators, and assigns, shall and will, at his and their own proper costs and charges during the said term, keep in good, sufficient, and tenantable repairs, as well all and singular the glass and other windows, rooms, floors, partitions, ceilings, walls, roofs, gutters, fences, pavements, grates, sinks, privies, drains, wells, and cisterns, as also all and every other the parts and appurtenances of the said premises.

And also that she, the said Bridget Powers, her executors, administrators, or assigns shall not, nor will at any time during the continuance of
48 said term use or carry on, or suffer or permit to be used or carried on in and upon said premises, or assign over this lease, or any part of the premises herein contained, to any person or persons carrying

on the business of a slaughter-house, currier, distiller, dyer, soap-boiler, tallow chandler, or any other noxious and offensive trade or business without the consent in writing of the party of the first part.

And also that she, the said Bridget Powers, her executors, administrators or assigns, or any of them shall not, *shall not* nor will at any time during the said term, demise, let, set or assign over the said premises or any part thereof to any person or persons whomsoever, for any term or time whatsoever without the license and consent in writing of the said parties of the first part;

And also that the said Bridget Powers, her executors, adminis-
49 trators, and assigns, shall and will on the last day of the said term, or other sooner determination of the estate hereby granted, peac'ably and quietly leave, surrender, and yield up unto the said parties of the first part or their successors in office, all and singular the said demised premises with their appurtenances, in such good, sufficient, and tenantable repairs as aforesaid; together with all and singular the doors, locks, keys, bolts, bars, chimney pieces, grates, windows, shelves, and other things thereunto belonging, in as good plight and condition as the same now are, reasonable use and wear thereof .

It is expressly understood and agreed by and between the parties hereto that the said second party is to save the parties of the first part harmless from any damages hereinafter to be claimed by the original lessees of said lot.

50 And the said parties of the first part, for themselves and their successors in office, do covenant and agree to and with the said parties of the second part, her executors, administrators, and assigns, by these presents, that the said party of the second part, her executors, administrators, and assigns, paying the yearly rents above reserved, and performing the covenants and agreements aforesaid on his or their part; the said party of the second part, her executors, administrators, and assigns, shall and may at all times during said term hereby granted, peac'ably and quietly have, hold, and enjoy the said demised premises for and during the term of years hereby granted without any manner of let, hindrance suit, or trouble from the said party of the first part, their successors in office or any person or persons whomsoever lawfully claiming by, from, or under them or any of them.

51 In testimony whereof the parties to these presents have hereunto set their hands and affixed their seals the day and year first above-written.

JOHN PARK, *Mayor.* [SEAL.]
BRIDGET POWERS. [SEAL.]

STATE OF TENNESSEE,
*County of Shelby, ss:*

Personally appeared before me John League, clerk of the county court of said county.

John Park and Bridget Powers, wife of John C. Powers, the bargainor to the foregoing and attached lease, with whom I am personally acquainted, and who severally acknowledged that they executed the same for the purposes therein contained, and the said Mrs. Bridget Powers on a private examination, apart from her husband, the said John C. Powers, acknowl-

edged the execution of the said lease to have been done by her
52 freely, voluntarily, and understandingly, without compulsion or constraint from her said husband, and for the purposes therein contained.

Witness John Loague, clerk of said court, at office this 2nd day of October, 1866.

JOHN LOAGUE, *Clerk*,
By JAMES REILLY, *D. C.*

STATE OF TENNESSEE,
*Shelby County:*

The foregoing and hereto attached lease with the clerk's certificate and United States revenue stamps to the amount of $1.00 thereto attached, was filed in my office for registration on the second day of October, 1866, at 12.35 o'clock p. m., and so noted in note book No. 5, page 217, and the same was this day duly recorded in my office in record book No. 57, part 2nd, pages 629, 630, 631, and 632.

October 29th, 1866.

CHAS. W. JOHNSTON, *Register*,
By FRED. W. WHITE, *D. R.*

53 (Indorsed:) 2552. Mayor and Aldermen to Bridget Powers. Lease. Clerk's fee, 50c. Paid. John Loague, clerk, by James Reilly, d. c. Filed Oct. 2, '66, at 12.35 p. m. Reg. fee, $1.45. Paid.

(Also indorsed:) No. 267. Circuit court of the United States, western district of Tennessee. J. C. Powers vs. M. L. Ensminger et al. Ex. B to bill. Filed Oct. 26, 1877. H. E. Andrews, clerk, by L. H. Pillsbury, d. c.

54 *Lease.*

M. L. Ensminger, by his agent, J. J. Sears, of the first party, and John C. Powers of the second party, hereby enter into the following contract, viz: The said first party, by these presents, leases to the said second party from the 20th day of July, 1876, until the 19th day of December, 1876, the following premises in Memphis, State of Tennessee, to wit, the north ½ or tenement in the west end of lot No. ten (10), of what is known as the navy-yard division; said house fronting on the east side of Promenade street, and the said party covenants that he will keep and secure said second party in the peaceful use and possession of said premises during the term of this lease, unless default of payment of rent, or other condition of this contract be made. The said second party for and in consideration of
55 the use of said premises agree' to pay to said first party or his assigns, the sum of twenty-five dollars per month, payable in monthly installments, for which promissory notes of date hereof have been executed; and the second party agrees to deliver up to the said first party, or his assigns, the said premises at the expiration of this lease, in good order and condition, and to make good all damages to said premises, except the usual wear and proper use of the same; and also to remain liable for rent until all the premises, with the keys of the same, clear of all goods *goods* or things not belonging to the same, be tendered or delivered to said

first party, his heirs or assigns, in like good order, and no demand or notice of such delivery shall be necessary. The second party agrees that he will not underlet the whole or any part of said premises without the written consent of said first party or his assigns. It is further agreed that in
56 default of either one or more of said payments, or any part thereof at maturity, or in case of underletting without authority, this lease may be declared forfeited by said first party, at his option, in which case the second party shall be liable for all rents until the possession be delivered and for all damages done to the premises; and the first party shall have the right to re-enter and take possession of said premises, without being required to make demand of the same, or demand the payment of rent due, or to give notice of the non-payment of the rent; and the first party shall not become a trespasser by taking possession as aforesaid. No set-off in payment of rent shall be allowed unless signed by the first party, his agent or assigns, and the said notes shall be full and complete evidence of the rent due and owing, and when no notes are given, the proof of the payment of rent shall be in the second party in all controversies. It
57 is agreed the said premises are in good order and condition at the date of these presents. In case of the default of the second party so as to forfeit *these* lease, in his absence from this city, service of process upon any adult occupying or in possession of the premises shall be good and valid process upon the second party.

And a lien is hereby given on the furniture on said premises for the security or prompt payment of said rent, or any costs that may accrue against said second party, in case of a forfeiture of this lease, and a surrender of said premises to said first party; but it is agreed that said second party may cancel this lease at any time in payment of rent due and any costs that he may be liable for, and he shall be exempt from paying any rent that might accrue after the surrender of said premises, provided all arrearages are paid.

It is further agreed that no alterations or repairs shall be done to
58 any part of said premises by said second party, without the first party's consent, in writing, under the penalty of double the cost necessary to put the premises in the condition they were when leased to said second party, and the second party shall not at any time remove any repairs, improvements, additions, or fixtures put in said premises; but the first party shall have and hold all of the same at the end of said lease. Said first party reserves the right to make such repairs as at any time are necessary to the security or *of* of said premises.

In testimony whereof the said parties have hereunto set their hands and affixed their seals this 25th day of July, one thousand eight hundred and seventy-six.

JOHN C. POWERS. [SEAL.]
M. L. ENSMINGER, [SEAL.]
By J. J. SEARS.

(Endorsed:) M. L. Ensminger to John C. Powers. Exhibit 6. Lease expires Dec. 19th, 1876.

3326——2

59 [Jno. R. Flippin, mayor.]

MAYOR'S OFFICE, CITY HALL,
*Memphis, Tenn., July 24th*, 1876.

To JOHN C. POWERS & BRIDGET POWERS.

You are hereby notified that the city of Memphis holds the lease made by it to Bridget Powers of lot 10 in the navy-yard, which lease is registered in the register's office of Shelby County in book 57, part 2, page 629, to be forfeited and terminated. And the city of Memphis hereby disclaims a forfeiture and determination of said lease because of a breach on your part of the terms, conditions, and agreements of said lease.

J. R. FLIPPER, *Mayor*.

A. J. MURRAY.

(Indorsed:) J. C. Powers vs. M. L. Ensminger. Ex. D. to bill. Filed Oct. 26th, 1877. H. E. Andrews, clerk, by L. H. Pillsbury, d. c.

60 The President of the United States of America to the marshal of the western district of Tennessee, greeting:

You are hereby commanded to summon Marmaduke L. Ensminger, J. J. Sears, and The City of Memphis, if to be found in your district, to appear before the judge of the circuit court of the United States, in the sixth judicial circuit for the western district of Tennessee, at Memphis, in said district, on the first Monday in October (1876) next, and then and there to answer John C. Powers and Bridget, his wife, in a bill of complaint in equity filed by them in court here against them the said Ensminger, Sears, and the City of Memphis.

Herein fail not, and have you then and there this writ.

61 Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States and the seal of said circuit court, at said Memphis, this 9th day of Sept'r, A. D. 1876, and the 101st of American Independence.

[SEAL.] H. E. ANDREWS, *Clerk*.

The defendants are required to enter their appearance in the above suit, in the clerk's office on or before the first Monday of October, 1876, otherwise the bill may be taken pro confesso.

This 9th day of September, 1876.

H. E. ANDREWS, *Clerk*.

Summons, returnable to Oct. rule day, A. D. 1876. Randolph, H. & J., attorneys.

62 *Marshal's return.*

On the 13th day September, 1876, I served true copy hereof, together with bill of complaint in this case, personally on the within named J. J. Sears, and on said date I served the City of Memphis, by true copy hereof, personally on R. C. Williamson, acting mayor, and L. P. Walker, city attorney of said city of Memphis. The within named M. L. Ensminger not found in my district.

L. B. EATON, *Marshal*,
By W. KOCH, *Dep.*

1 serv. bill, 2.00; 3 serv. sum's, 6.00; 3 miles, 0.18—$8.18.
Returned 25th day of Sept'r, A. D. 1876.

H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

63 Know all men by these presents that we, John C. Powers and Bridget, his wife, and Mary Powers, held and firmly bound unto said defendant in the sum of two hundred and fifty dollars; but to be void on condition that the said defendants do pay and satisfy all costs that may accrue in that behalf in prosecution of the said suit this day commenced by the said plaintiff in the circuit court of the United States for the western district of Tennessee at said Memphis against the said defendant; and also on failure of the said plaintiff to prosecute their said suit with effect, and also on failure of the defendant, if convicted, to pay said costs.

Witness our hands and seals this 9th day of September, A. D. 1876.

JOHN C. POWERS, [SEAL.]
By W. M. RANDOLPH, *Att'y.*
BRIDGET POWERS. [SEAL.]
MARY POWERS. [SEAL.]

Approved by and acknowledged before me the 9th day of September, A. D. 1876.

H. E. ANDREWS, *Clerk.*

64 United States circuit court for western district of Tenn.

JOHN C. POWERS AND WIFE, BRIDGET POWERS,
*vs.*
M. L. ENSMINGER, J. J. SEARS, THE CITY OF Memphis. } 267.

Comes the defendants M. L. Ensminger and J. J. Sears, not confessing complainants' bill to be true, but denying each and every allegation therein contained, doth demur to the same, and for cause of demurrer shows:

1st. Because said bill claims and purports to be a bill of review, and is filed without leave of the court first had and obtained.

2nd. Because the bill, although purporting to be a bill of review of the case of City of Memphis & Bridget Powers against these defendants heretofore described in this court, fails to show any error of law upon
65 the face of the decree in said cause, or any new matter discovered since the commencement of said suit.

3rd. Because if this bill is relied on as an original bill it shows that all of the rights and equities therein sought by compl'ts have been settled and adjudicated in the case of City of Memphis et als. against Ensminger et al., wherein compl't Bridget Powers and the City of Memphis were party compl'ts and these defendants were defendants, and the decree in said cause having adjudicated the title to the property, as shown by the bill, to be in these defendants and against compl'ts Bridget Powers, is a finality as to this question.

4th. Because it being shown that the same subject-matter as is contained in this suit has been adjudicated between compl't Bridget Powers and these defendants in the former suit in this court, and it also appearing

66 that the lease made by the City of Memphis was to Bridget Powers, and said compl't Jno. Powers was not a necessary party to said former suit, and the decree therein is binding as to compl't Bridget.

5th. Because the property herein sought to be recovered by complainants is shown by the bill to have been dedicated to the city of Memphis for public and corporation purposes, and being so held, any assignment or conveyance of the same to compl'ts was void.

6th. Because each of the causes assigned by the bill going to show the illegality of def'ts' title under the tax sale has been formerly settled and adjudicated in the former suit in this court.

7th. Because compl'ts' remedy, if any they have, is against the City of Memphis upon its breach of warranty and not against def'ts.

8th. Because the bill seeks relief against the City of Memphis for the full value of its lease and damages thereon on the theory
67 that defendant had a perfect title to the property at the time of the lease from the city by Bridget Powers.

9th. Because there is a misjoinder of parties, both plaintiffs and defendants.

10th. Because the bill is multifarious in embracing two distinct subjects, and in uniting improper parties as defendants.

11th. Because the City of Memphis has terminated the lease, as it had the right to do, under which compl'ts claim title prior to the commencement of this suit.

12th. Because compl'ts' lease is conditional and terminates upon a failure of comp'ts to comply with said conditions, and the bill does not show that the conditions have been complied with.

Wherefore defendants pray judgment of the court whether they shall be required to make other or further answer.

MYERS & SNEED, *Att'ys.*

68 (Endorsed:) No. 267. Circuit court of the United States, western district of Tennessee. John C. Powers et al. vs. M. L. Ensminger et als. Demurrer of def'ts Ensminger and Sears. Filed Nov. 22nd, 1876. H. E. Andrews, clerk, by L. H. Pillsbury, d. c.

69 In the United States circuit court for the western district of Tennessee, now sitting in equity.

JOHN C. POWERS AND BRIDGET, HIS WIFE,
*vs.*
M. L. ENSMINGER AND OTHERS. } 267.

The defendants will take notice that on Saturday, the 9th December, 1876, the plaintiffs will move the court for an injunction in pursuance of the prayer of the bill, when and where the defendants may be heard if they so desire.

RANDOLPH, HAMMOND & WASSELL,
*For Pl'ffs.*

On the 4th day of December, 1876, at the city of Memphis, Tennessee, I delivered the defendant J. J. Sears and Wm. M. Sneed, of the firm of Meyers and Sneed, solicitors of record of both the defendants—the

70 defendant Ensminger not being in the district, as I am informed—each true copies of this notice.

SAN S. WASSELL.

Subscribed and sworn to before me this 4th day of Dec., 1876.

H. E. ANDREWS, *Clerk.*

(Endorsed:) 89 eq. In the U. S. circuit court for the western district of Tennessee. John C. Powers et als. vs. M. L. Ensminger et als. Notice of motion for injunction. Filed Dec. 4th, 1876. H. E. Andrews, clerk. Randolph, H. & W., att'ys for pl't'fs.

71 United States circuit court for the western district of Tenn. Equity side.

JOHN C. POWERS AND BRIDGET POWERS
*vs.*
M. L. ENSMINGER ET ALS. } 267.

Comes the defendants Ensminger & Sears, upon leave of the court first had, and for further cause of demurrer to complainants' bill herein filed says:

That the lease from the City of Memphis to com'pl't Bridget Powers, set forth in the bill, under and through which said compl't claims title to the property, is null and void, because it appears that at the date and execution of the same, compl't Bridget was a married woman, living with her husband, and said lease purports to be a contract between said Bridget as a married woman and the City of Memphis, in which
72 said compl't's husband is not a party, and in no way bound thereby, and it does not appear that said married woman has any power to contract by reason of a separate estate or marriage contract before marriage or otherwise, for which def'ts claim that said leaseis void, and the bill should be dismissed.

Said def'ts further demur to said bill because, as they allege, there is no equity on its face, and for that reason should be dismissed.

(Endorsed) No. 267. Circuit court of the United States, western district of Tennessee. J. C. Powers et als. vs. M. L. Ensminger et als. Demurrer. Filed Dec. 7th, 1876. H. E. Andrews, clerk.

73 UNITED STATES OF AMERICA,
*Western District of Tennessee:*

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its November term, A. D. 1876, at the United States court-house, in the city of Memphis, in said district, to wit, the 11 day of Dec., A. D. 1876, in the following cause, to wit:

JOHN C. POWERS AND BRIDGET POWERS, plaintiff', *vs.* M. L. ENSMINGER ET AL., DEFENDANT'. } No. 267.

For satisfactory reasons, it is ordered that the application of complainant for an injunction be, and the same is, continued till to-morrow.

74 UNITED STATES OF AMERICA,
*Western District of Tennessee:*

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof begun and held for its Nov. term, A. D. 1876, at the United States court-house in the city of Memphis, in said district, on, to wit, the 12th day of Dec., A. D. 1876, in the following cause, to wit:

JOHN C. POWERS ET AL., PLAINTIFF', *vs.* M. L. ENSMINGER ET ALS., DEFENDANT'. } No. 267.

This day the parties appear by their respective solicitors, and on motion of the plaintiffs, and the court having heard the argument of counsel for and against the same, it is ordered that leave be given the plaintiffs to file their bill already in court as a bill of review. And thereupon the demurrers of the defendants Ensminger and Sears to the bill were heard; and the court having considered the arguments of the counsel of the
75 respective parties, and being sufficiently advised in the premises, it is ordered that the said demurrers be, and they are hereby, overruled, and that the plaintiffs recover of the defendants the costs thereof, for which execution may issue. But the defendants have leave, if they desire to do so, to incorporate the matters of the said demurrers in their answer, and to rely thereon at the hearing. And thereupon the plaintiffs' motion for a writ of injunction, as prayed in their bill, came on to be heard; and the court having heard the argument of counsel thereupon, and being sufficiently advised, is of opinion that the said injunction ought to issue as prayed for, and to remain in force till the further order of the court.

It is, therefore, ordered that the clerk of this court, upon the plaintiffs' entering into bond, payable to the defendants Ensminger and Sears, in the penal sum of two thousand dollars, with good and sufficient surety to be approved by the clerk, conditioned that if the said injunction shall be dissolved and the plaintiffs shall pay or
76 cause to be paid to the defendants all such damages as they may sustain by the wrongful suing out of said injunction, and all such sums of money as the court here may decree them to pay, and otherwise perform thereunder *and* decrees of the court in the premises, then to be void, otherwise to remain in full force and effect, shall issue under the seal of the court a writ of injunction enjoining and restraining the said Sears and the said Ensminger and their agents and attorneys from collect-

ing the rent of the property involved herein, to wit: Lot (10) of the navy yard property, in the city of Memphis, beginning at the northeast corner of lot 9, running thence north and parallel with Chickasaw street fifty-five (55) feet and $\frac{3}{100}$ to the southeast corner of lot eleven (11); thence running west one hundred and seventy (170) feet to Promenade street; thence running south and parallel with Promenade street fifty-five (55) and
77 $\frac{3}{100}$ feet to the northwest corner of lot (9) nine, and thence running east one hundred and seventy (170) feet to the point of beginning, or any part thereof, from the plaintiffs, or either of them, or the tenants in possession of the same, or any one else, and from interfering with the possession or control of the said property by the plaintiffs, and from collecting, assigning, or in any way disposing of the notes given by the plaintiff John C. Powers to the defendant Sears, for the rent of the said property, or a part of it, as is more fully stated in the bills, until the further order of the court. And thereupon, by the leave of the court, the plaintiffs' amend their bill by striking out and dismissing so much of it as prays special relief against the City of Memphis, such dismissal to have no effect on the residue of the bill. And the defendants are hereby required to answer the bill by the rule day in February, 1877.

78 Know all men by these presents that we, M. L. Ensminger and Geo. Gillham and J. J. Sears, held and firmly bound unto said defendant, , in the sum of two hundred and fifty dollars, but to be void on condition that the said defendants do pay and satisfy all costs that may accrue in that behalf in the prosecution of the said suit this day commenced by the said plaintiff in the circuit court of the United States for the western district of Tennessee, at the said Memphis, against said defendant, and also on failure of the said plaintiff to prosecute the said suit with effect, and also on failure of the defendant, if convicted, to pay said costs.

Witness our hands and seals this 24th day of Feb'y, A. D. 1877.

M. L. ENSMINGER, [SEAL.]
By J. J. SEARS,
*Att'y in Fact.*
J. J. SEARS. [SEAL.]
GEO. GILLHAM. [SEAL.]

79 Approved by and acknowledged before me this 24th day of Feb'y, A. D. 1877.

H. E. ANDREWS, *Clerk.*

(Indorsed:) No. 267. Circuit court of the United States, western district of Tennessee. John C. Powers vs. M. L. Ensminger. Cost bond. Filed Feb'y 24th, 1877. H. E. Andrews, clerk.

80 my presence and approved by me this 22d day of December, 1876.

L. H. PILLSBURY,
*Deputy Clerk.*

UNITED STATES OF AMERICA,
*Western District of Tennessee:*

Personally appeared before me, L. H. Pillsbury, one of the commis-

sioners of the circuit and district courts of the United States for said western district of Tennessee, Mary Powers, one of the sureties on the within bond, who, being by me first duly sworn, makes oath and says that 'he is a resident of the district of West Tennessee, and is worth the sum of two thousand dollars in unencumbered real estate in her own name and right, over and above her legal debts and liabilities, and subject to execution under the laws of the State of Tennessee; that said property is situate in Memphis, the county of Shelby, and State of Tennessee, and described as follows: A house on Jackson st., navy-yard property, Memphis, Tenn.

MARY POWERS.
L. H. PILLSBURY,
*United States Commissioner for the Western District of Tennessee.*

Subscribed and affirmed to before me this 23d day of Dec'r, A. D. 1876.

L. H. PILLSBURY,
*U. S. Com'r.*

(Indorsed:) No. 267. Circuit court of the United States, western district of Tennessee. John C. Powers vs. Ensminger & Sears. Filed Dec. 23d, 1876. H. E. Andrews, clerk. L. H. Pillsbury, d. c.

(Endorsed:) Circuit of the United States, western district of Tennessee. John C. Powers et al. vs. Ensminger & J. J. Sears. No. 267. Bond. Filed Dec. 23d, 1876. H. E. Andrews, cl'k., by L. H. Pillsbury, d. c.

81 UNITED STATES OF AMERICA,
*District of West Tennessee:*

The President of the United States to the marshal of the United States for the district of West Tennessee, greeting:

*John C. P.* Whereas John C. Powers and Bridget, his wife, have filed their bill of complaint in the circuit court of the United States for the said district, in equity, against Marmaduke L. Ensminger, J. J. Sears, and others, and have obtained from the court an order that an injunction issue in accordance with the prayer of their said bill on the giving of an injunction bond as prescribed in the said order; and the said bond have been given and approved:

82 You are therefore hereby commanded that you make known to the said Marmaduke L. Ensminger and the said J. J. Sears, and their agents and attorneys, that they, and each of them, are hereby enjoined and restrained from collecting the rent of the property involved in the said suit, to wit: Lot ten (10) of the navy-yard property in the city of Memphis, beginning at the northeast corner of lot nine (9), running thence north and parallel with Chickasaw street, fifty-five (55) feet, and $\frac{31}{100}$ to the southeast corner of lot eleven (11); thence running west one hundred and seventy (170) feet to Promenade street; thence running south and parallel with Promenade street fifty-five (55) feet and $\frac{31}{100}$ to the northwest corner of the said lot nine (9), and thence running east one hundred and seventy (170) feet to the point of beginning, or any

83 part thereof, from the plaintiffs, or either of them, or the tenants in possession of the same, or any one else, and from interfering with the possession or control of the said property by the plaintiffs; and from collecting, assigning, or in any way disposing of the notes given by the plaintiff, John C. Powers, to the said Sears for the rent of the said property, or a part of it, as is stated in the bill, until the further order of the court, under the penalties prescribed by law. And you will make return of the manner in which you execute this writ to the court on the first day of the next term.

Witness Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 23d day of December, 1876, and the seal of the said circuit court.

H. E. ANDREWS, *Clerk.*

(Endorsed:) John C. Powers & wife vs. M. L. Ensminger &
84 others. No. 267. Equity. Injunction. Ret'd't filed Jan'y 5, 1877. H. E. Andrews, clerk. L. H. Pillsbury, d. c.

United States court, western district of Tennessee.

JOHN C. POWERS AND WIFE BRIDGET } *vs.* M. L. ENSMINGER ET ALS. } No. 267. Equity side.

Come the defendants M. L. Ensminger, a citizen of the State of New York, and J. J. Sears, agent of said Ensminger, a citizen of Tennessee, and, for answer to so much of complainants' bill as they are advised it is material for them to answer, respectfully show:

That they presume it is true that complainants were married
85 on the 14th of September, 1874, and have been since said date up to the present time living as man and wife, and the complainant Bridget was the lessee of the property described in the bill under a lease from the city of Memphis, but as to said last fact, as well as to the date of said lease and legal effect thereof as to right of said complainant thereunder, they refer to the same which is promised will be filed on or before the hearing of this cause.

Respondents presume that the conveyance of Sept. 18th, 1828, referred to in the bill as the title by which the city of Memphis acquired said property, as well as the transfer of the same to the United States Government, and the reconveyance by said government to the city of Memphis, of the dates mentioned in the bill, but they do not admit that the
86 conveyance by *by* the city of city Memphis to the United States was without legal authority on the part of said city, but they allege that said conveyance was a legal transfer under the power so possessed by said city to convey the same, as being property not used or needed by the said corporation for municipal purposes, and, as such, subject to sale or transfer, all of which they are advised has been passed upon by the courts, and so adjudicated. And they do not admit the legal effect of said conveyance as claimed by the bill, but should it become necessary to their rights in this cause they will insist that a true copy of said conveyance shall be furnished by complainants, and the legal force and effect thereof construed by this court; and respond-

ents are advised that as this property was conveyed by the said city of Memphis to the United States Government in 1844, and divided off into
87 plats and lots for lease in 18 , upon the theory that it was not necessary for public purposes that each of said acts was an election or determination on the part of said city that said property was not necessary for corporation purposes and therefore subject to sale or transfer by said city, and being so was at date of defendants' tax sale in 1864, subject for the tax under and for the purposes for which it was assessed, and by virtue of said sale the defendant M. L. Ensminger acquired a perfect title thereto.

Respondents deny that the lease referred to by which compl't Bridget claims to hold title as lessee from the city of Memphis, and described as Exhibit A, contains any agreement or stipulation by which said lessee was, at the termination of said lease, entitled to resume the build-
88 ing and improvements put upon said lot during said lease, or that there was any contract which obligated the city to any such agreement; but, however such may be, they deny that they would in any way be held to a compliance with said stipulation, but are advised that having purchased said property, as will hereafter be shown, they acquired a title to the same free from any and all such incumbrances.

Respondents show that at the commencement of this suit they were owners of said property and in possession thereof, having acquired title thereto on the 24th day of June, 1864, by becoming a purchaser at the United States direct tax sale duly made by E. P. Ferry, John B. Rodgers, and Delano T. Smith, commissioners of the United States for the collection of direct taxes in the insurrectionary districts within the United
89 States, and for other purposes, under an act of *of* Congress, passed June 7th, 1862, and acts amending the same, at which said sale, which was duly advertized and made according to law, the following property, being the same described in the bill, was struck off to the defendant, he being the highest and best bidder, to wit: A lot or parcel of land, to wit, on Chickasaw street, fifty-five feet and seven one-hundredths by one hundred and seventy feet; lot 10, assessed to G. McLeon in 1860, fifth civil district, city of Memphis, at the sum of three hundred and five dollars, and thereupon the said commissioners duly executed to said defendant Ensminger a certificate of sale, a copy of which he hereunto files as
E. A. Exhibit A to this answer, and retains the original, which he will produce on the hearing if required.

And respondent says that the said Ensminger acquired thereby an absolute fee simple title in and to said lot and the right of possession
90 thereto and he had caused his writ of possession to issue, putting him in possession thereof, which he was entitled to under the law, and would have taken possession but for a bill which was filed against him and his codefendant Sears on the day of , 1867, by the City of Memphis, the complain'ts' lessor, and comp't Bridget, which enjoined him from taking possession of said lot, and which sought to have said tax sale under which respondent claimed set aside and for nought held.

Respondents show that said bill, which was filed as stated by the city of Memphis and Bridget Powers, complain'ts against these defendents, and which was instituted and sworn to by comp't John C. Powers, who is and was at that time the husband of comp't Bridget, set up and claimed all of the rights and equities for said compt's which are sought by them in this

suit. And the defendant by answer made the same defense as is
91 herein alleged, all of which was duly passed upon by this court in favor of the def'ts and against the complainants therein and the title of said property established to be in def't Ensminger, and a writ of possession awarded, which said decree was affirmed by an appeal to the Supreme Court of the United States, and, as respondents submit, is an adjudication, of all the questions and allegations in this bill in favor of def't Ensminger, and said proceedings and papers in said former suit are referred to as part of comp'ts present bill, and these respondents ask they may be looked to for a more minute exact particularity.

Respondents deny that said direct tax was excessive and demands proof, but if said amount of assessment was excessive, then they submit that this would not invalidate the sale and title thereunder. They deny that the commissioners entered upon their duties prematurely for, as they allege, at time they did so, the military forces of the United States had been
92 established over the section or county in which said land was situated and over more than one county in the State, but if this was otherwise they submit that this act in this particular was merely directory, and complainants cannot complain. They deny that the advertiz'ment was not duly made according to law, and allege that it was so made for four weeks in the supplement of the Memphis Bulletin, a newspaper published in the city of Memphis, and if this is not so they submit that comp'ts cannot take advantage of it, as by the non-payment of the taxes within sixty days after they were fixed by the commissioners the land became forfeited to the United States.

They submit that said sale was made on the 24th of June, 1864, as shown above, which was one of the adjourned days of sale after the same was commenced, and complain'ts have lost and forfeited their rights,
93 title, and interest in said land, and are not entitled to the relief sought by their bill.

They deny that the description under which said property was advertized and sold and assessed was so defective, indefinite, and insufficient that no title or interest passed, but they allege that the same was sufficient in all respects as required by law.

They further deny that the military forces of the United States were in 1864, or at the time of said sale, in possession of said property, or excluded the owners therefrom, but if such was the fact respondents submit that this did not exempt said property from the payment of said tax and from sale for failure to pay the same, and the sale was effective to convey title to the purchaser.

Respondents are advised that although said lease from the city of Memphis to comp't Bridget was not made until 1866, still said
94 property had been divided off in lots and offered for lease by said city prior to the assessment of said tax in 1864, and that at one time prior to that date a lease had been made of the same by the city which was not carried into operation by failure of the lessee to comply.

They deny that said property was ever exempt from taxation by reason of an act of the legislature of Tennessee, in 1861, or by any other law, but submit that it was taxable as all other property under the laws of Tennessee; and the' further deny that said property was in 1861, or at any time since or before that date, held for municipal purposes.

Respondents do not admit that the complainants assigned and conveyed to McMahon, with the knowledge and consent of the city of Memphis, but are advised that said conveyance was without the verbal or
95 written consent or acquiescence of said city, and being an assign*ed* of said lease, or a portion thereof, without said city's written consent, is a forfeiture under said lease by which complain't claims title; but, however this may be, they show that said conveyance to McMahon was subsequent to said tax sale and subsequent to the commencement of the suit of the City of Memphis & comp't Bridget, and being so, does not give said McMahon or these comp'ts any rights or equities other than they would have possessed had said conveyance been made.

They admit the *the* def't Ensminger is a non-resident of the State of Tennessee, but is a man of good means and liable for all his obligations. They deny that def't Sears is insolvent, but aver that he is fully able to meet all of his obligations, and has sufficient means to indem'fy comp'ts, or any others, in damages for whatever just claims they may prefer against him.

96 Respondents deny that they are, or can be in any event, liable to comp'ts for the value of the improvements put upon said land or lot, but say that the lease by which they claim title from the city of Memphis was made subsequent and subject to def'ts' title by tax certificate, and besides there is no clause in said lease allowing the same, even against the City of Memphis; and such being the case, the improvements follow the land.

Respondents further submit that the assessment levy and tax sale under which the' claim and acquired title to the property in controversy was regular in all and every respect, and conveyed to said Ensminger a perfect title to said property, free from all liens and incumbrances; and that the complain'ts claim of title thereto was acquired subsequently to said sale, and therefore subject to respondents' title; and further show that
97 the tax certificate under which they held title was at the date of complain'ts lease on record, and was under the laws a fact and notice that was binding on complain'ts; and any failure on her part to avail herself of notice thereof cannot be offered to respondents' injury.

Respondents are also advised that the comp'ts have long since forfeited their lease, as claimed, from the City of Memphis, and the City of Memphis had, prior to the commencement of the suit, taken advantage of said forfeiture and notified the comp'ts thereof; and the comp'ts, nor their lessee, have at this any title to said property against the City of Memphis, or any one else; that there is now due and unpaid upon said property taxes to the sum of $1,200 to $1,500 *dollars*, or more, and ground rent for a large amount which complainant agreed and obligated herself
98 to pay under said lease, and said failure to do so works, as respondents ar' advised, a forfeiture thereunder.

Respondents are further advised that although the complainant's, John C. Powers' name does not appear in the body of the bill filed by the City of Memphis et al., as above referred to, as a party, still they show that said suit was commenced at his instance and request, and that he swore to the bill, as is shown by reference thereto, prosecuted the same in conjunction with his cocomp'ts, Bridget, and cannot now claim any advantage by an omission on the part of the draftsman of said bill to add his name as party thereto.

Respondents show that said suit before referred to, under which all of comp'ts' rights were fully passed upon and considered by this court was a final adjudication of all of the questions and rights therein set up. They deny that the pleadings or parties were not properly before the
99 court in said cause, as is claimed in comp'ts' bill, but submit that on account of said former adjudication this bill should be dismissed.

And respondents refer to the pleadings, papers, and decree in said cause of City of Memphis et al. vs. Ensminger et al., and asks that they may be taken as a part of this answer and considered in the adjudication of this cause. They submit the decision in said cause being upon the same facts and rights as are claimed by comp'ts in this cause and between the same parties is res judicata as to this suit, and def'ts hereby plead the same as a complete bar to this suit and action.

Respondents do further deny each and every allegation and charge set out in said bill which has not been expressly admitted as true by this their said answer.

100 For further reason why said bill should not be sustained but dismissed at the hearing at complainants' cost, respondents do hereby, upon leave of the court first having been obtained at the hearing of def'ts' demurrer heretofore filed, set up in this answer all of the defenses which were made by their demurrer herein, and which they now ask may be considered in this answer.

1st. Because said bill claims and purports to be a bill of review, and is filed without leave of the court first had and obtained.

2d. Because said bill, although purporting to be a bill of review of the case of City of Memphis & Bridget Powers vs. Sears and Ensminger, heretofore described in this court, fails to show any error of law upon the face of the decree in said cause or any new matter discovered since the commencement of said suit.

101 3d. Because if this bill is relied on as an original bill it shows that all of the rights and equities therein sought by comp'ts have been settled and adjudicated in the case of the City of Memphis vs. Ensminger et al., wherein comp't Bridget and the City of Memphis were comp't, and respondents were defendants.

4th. Because it being shown that the same subject-matter as is contained in this suit has been adjudicated comp't Bridget and these defendants in the former suit in this court; and it also appearing that lease made by the City of Memphis was to Bridget Powers, said John Powers was not a necessary party thereto, and the decree therein is binding as to comp't Bridget.

5. Because each of the causes assigned by the bill, going to show the illegality of def'ts' title under the tax sale has been settled and adjudicated in the former suit in this case.

102 6th. Because comp'ts' remedies, if any, are against the City of Memphis and not against respondents.

7th. Because the bill seeks relief against the City of Memphis for full value of its lease and damages thereon, on the theory that defendants acquired a good title under their tax *value* prior to comp'ts' lease.

8th. Because there is a misjoinder of parties, both plaintiffs and defendants.

9th. Because the bill is multifarious in embracing two distinct subjects and in uniting improper parties.

10th. Because the City of Memphis had terminated the lease prior to filing of their bill, as it had the right to do under the lease.

11th. Because comp'ts' lease was conditioned and has been terminated by failure of comp't to comply with its conditions.

Respondents again deny each of comp'ts' allegations, which they have not heretofore specially admitted as true, and require strict proof as to each on part complainants.

103 Respondents are further advised that said property is likely to become lost to respondents by reason of the failure of comp'ts to keep down the taxes arising thereon; that same has been forfeited and sold and is subject to sale under the decree in the chancery court of Shelby County for past-due taxes; and unless the proceeds arising from the rent of this property is applied towards the discharge of said liens the same will be lost at the termination of this litigation; and that complainants are insolvent.

Premises considered, respondents pray that they may be allowed to file this both as an answer and cross-bill, and complainants be required to answer the same but not under oath, as that is expressly waived; that at the final hearing of this cause it may be decreed that the defendant M. L. Ensminger has the legal and equitable title to the property herein sought to be recovered; that the tax-sale and title acquired thereby were

104 valid, and that comp'ts' lease, being subsequen tthereto, can affect respondents' title in no manner whatever. That it may be further decreed that the comp'ts' are indebted to respondent Ensminger for the amount of the taxes due upon said and damages for retaining possession of the same from the date of comp'ts' possession thereof, and cost of this suit, and decree granted accordingly; that it may be adjudged and decreed that all of the questions and rights claimed by comp'ts' bill has been finally settled and adjudicated in the case of City of Memphis and Bridget Powers vs. Ensminger & Sears, heretofore decided by this court, and that this comp't' bill, by reason thereof, should be dismissed.

And respondents further pray that the possession of this said property, which has been, since the commencement of this suit, taken from the control and possession of the respondent and turned over to complainant, may be restored to said respondent under the decree of the former

105 suit of the *the* City of Memphis vs. Ensminger and Sears, by virtue of his tax certificate, under the law of Congress in such cases provided; and should this be refused they ask that a receiver may be appointed to take charge of said property, collect the rents arising therefrom and apply the same to the taxes due and accruing.

And respondents pray for such other and further relief as they may show themselves entitled to in the premises.

And they will ever pray.

MYERS & SNEED, *Att'ys.*

Personally appeared before me J. J. Sears, who on oath says that the facts set forth in the foregoing answer are true to the best of his knowledge, information, and belief.

J. J. SEARS.

Subscribed and sworn to before this 24th day of Feb'y, 1877.

H. E. ANDREWS, *Clerk.*

106 (Endorsed:) J. C. Powers et al. (U. S. circuit ct., w. d. T.) vs. M. L. Ensminger et al. Answer & cross-bill. Filed Feb'y 24, 1877. H. E. Andrews, cl'k.

107 In the circuit court of the United States for the district of West Tennessee. In equity.

JOHN C. POWERS AND BRIDGET POWERS, HIS wife,
*vs.*
M. L. ENSMINGER AND J. J. SEARS & CO.

The plaintiffs came, and for replication to the answer of defendants Ensminger and Sears, filed herein on the 24th February, 1877, say that the matters of the said answer, so far as they contradict or are inconsistent with their said bill, are untrue, insufficient, and imperfect, and that their said bill is certain, true, sufficient, and perfect, as they will on the hearing fully maintain and prove.

RANDOLPH, HAMMOND & WASSELL,
*Sol's for Pl'ffs.*

(Endorsed:) J. C. Powers & wife vs. M. L. Ensminger & others. No. 267. Equity. Replication. Filed June 18, 1877. H. E. Andrews, clerk; L. H. Pillsbury, d. c.

108 In the circuit court of the United States for the district of West Tennessee. In equity.

JOHN C. POWERS AND BRIDGET, HIS WIFE,
*vs.*
MARMADUKE L. ENSMINGER.

The deposition of THOMAS FOLEY, a witness for the pl'ffs, taken on the 28th December, 1877, by consent of parties, to be read as evidence on the hearing of the cause, subject to objections for irrelevancy and incompetency, all formalities being waived.

Qu. 1st. State your name, age, residence, occupation, and how long you have resided in Memphis.

Ans. Thomas Foley; age, about 52 years; reside on the corner of Chickasaw or Front street and Commerce, Memphis, and have resided in Memphis and the vicinity twenty six or seven years; by occupation, a laborer.

Q. 2. Do you know the property on which the house occupied
109 by Mr. Powers, being lot ten (10) of the navy-yard property; if so, how long have you known it, and how has it been occupied since you knew it?

Ans. I know the lot on which the house stands, but I do not know the number of it. I have known it over twenty years. It was a part of the navy-yard when the U. S. Government had the navy-yard here. It was within the enclosure of the navy-yard property. On the east or Front street side there was a high brick wall, and on the west or Promenade street side there was an iron fence, I think. The wall was taken away at differ-

ent times after the navy-yard property was first leased by the city. The lot never had any house upon it, nor was it separated by a wall or fence or other obstruction from the other navy-yard property until Mr. or Mrs. Powers put their house there since the war. During the war the
110 navy-yard property was occupied by the Federal soldiers. The lot mentioned was used a part of the time for a camp by the soldiers. After the Federal soldiers had left the navy-yard, say about ten or eleven years ago, Mr. or Mrs. Powers put up their house there.

Q. 3. Do you know what the cost of the improvements put by Powers on the lot was?

Ans. I could not tell exactly, but I should think the cost at least four or five thousand dollars.

Q. 4. Do you know anything of the house and improvements put on the portion of the lot next to Front street by John McMahon; if so, please state the character of the house and improvements, and their cost, if you know?

Ans. I know John McMahon put a house and improvements on the portion of the lot mentioned, about a year after Powers' house was
111 put up. The house of McMahon is a two-story brick, having two large rooms down-stairs, and I do not know how many up stairs. I think the house is about fifty feet long, and was intended for a saloon, with a room in the rear, or could be turned all into one store, if wanted that way. I should think McMahon's house and improvements cost from three thousand five hundred to four thousand dollars.

Q. 5. How long have you known John C. Powers and Bridget, his wife, and what do you know of their marriage?

Ans. I have known John C. Powers twenty years or over. I have known Mrs. Powers since before she and Mr. Powers were married. I was not present at the marriage, but I remember about the time it occurred. I could not fix the date of the marriage, but I know it was
112 before the house and improvements on the lot mentioned above were put there, as I have stated.

Cross-examination:

Defendant, reserving all proper exceptions to this deposition for want of competency and relevancy, proceeds to cross-examine, as follows. Cross-examined by defendant:

Ques. 1st. Where were you during the war; if in Memphis, what years?

Ans. I was in Memphis, with the exception of a month or so, when I went to St. Louis. My family was here all the war.

Ques. 2. Was not this property herein described vacant during the whole war, and was not the house erected thereon by Mr. Powers the first building that you ever knew on it?

Ans. Yes, sir.

Ques. 3d. Was there any enclosure around this lot prior to Mr. Powers' building being erected thereon?

Ans. Not that I know of.

Ques. 4. Were not the soldiers, during the war, located within
113 the lines of the navy-yard proper, and were any of them encamped, at any time, east of Promenade street?

Ans. There was a regiment or company encamped on this lot for awhile, just like they would go out and camp on the levee. This I do not think was a regular camp; they were only there for a week or so.

Ques. 5. Where was the regular camp of the soldiers at the time this regiment or company was on this lot?

Ans. In the navy-yard, west of Promenade st. This lot is east of Promenade.

Ques. 6. What was the date that the soldiers were located on this lot; what year and month?

Ans. I can't say what year.

Ques. 7. Did Mr. Powers have any claim or exercise any control over this lot prior to the end of the war?

Ans. I can't say. I did not know Mr. Powers claimed this property until I saw him building his house.

Q. 8. How far do you live from this lot, and how long have you resided there?

Ans. I live just across the street from it, and have been living there about 19 years; have owned the lot I live upon some twenty-five years.

114 Ques. 9. About what time did Mr. Powers and McMahon commence to erect improvements on this property?

Ans. I think it has been about ten years ago that Mr. Powers commenced; Mr. McMahon about one year after Mr. Powers.

Re-examination:

Q. 1. Did you know of any one asserting a claim as lessee or otherwise to the lot Powers' house stands on before Powers put his house there, or being in possession of the lot?

Ans. I never did.

And further deponent saith not.

THOS. FOLEY.

Subscribed and sworn to before me this 28th December, 1877.

L. H. PILLSBURY,
*Deputy Clerk and U. S. Com'r.*

(Endorsed:) Eq. 267. Jno. C. Powers and wife v. M. L. Ensminger. Deposition of Thos. Foley. Filed Dec. 28, 1877. H. E. Andrews, clerk. L. H. Pillsbury, d. c.

115 UNITED STATES OF AMERICA,
*Western District of Tennessee:*

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov. term, A. D. 1877, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 21 day of May, A. D. 1878, in the following cause, to wit:

JOHN C. POWERS ET AL., PLAINTIFF,
*vs.*
M. L. ENSMINGER ET ALS., DEFENDANT. } No. 267.

By consent of counsel, it is ordered by the court that the above cause be continued till the November term of this court, 1878.

116 *Mrs. Bridget Powers to City of Memphis, Dr.*

1866.
Dec. 15. To rent of lot No. 10 to date..... $127 19
Rec'd paym't.

SMITH P. BANKHEAD,
*Special Att'y.*

[2. 2. U. S. internal revenue (2) stamp (2). S. P. B. 2. July 7th, 1867. 2. 2.]

*Mrs. Bridget Powers to E. McDavitt, receiver, Dr.*

For rent navy-yard lot No. 10, from 15th June, 1869, to 15th Dec'r, 1869, at $127.19 per year..... $63 59
Rec'd payment.
Memphis, Dec'r 17th, 1869.

E. McDAVITT, *Receiver.*

MEMPHIS, TENN., *June 15th*, 1869.

Received of Bridget Powers three hundred and seventeen and $\frac{97}{100}$ dollars, for rent of lot No. 10, from Dec. 15th, 1866, to June 15th, 1869. $317.97.]

E. McDAVITT, *Receiver.*

117 MEMPHIS, TENN., *June 15th*, 1870.

*Bridget Powers to Navy Yard Receiver, Dr.*

For rent of lot No. 10, in navy-yard, from Dec. 15th, 1869, to June 15th, 1870, six months, at $127.18 per annum..... 63 59
Received payment.

E. McDAVITT, *Receiver.*

MEMPHIS, TENN., *June 15th*, 1871.

*Mrs. Bridget Powers to Navy Yard Receiver, Dr.*

For rent of lot No. 10 in navy-yard from Dec. 15th, 1870, to June 15th, 1871, six months, at $127.18 per annum..... 63 59
Received payment.

E. McDAVITT, *Receiver.*

MEMPHIS, TENN., *June 15th*, 1871.

*Mrs. Bridget Powers to Navy Yard Receiver, Dr.*

For rent of lot No. 10 in navy-yard from Dec. 15. 1870, to June 15, 1871, six months, at $127.18 per annum..... 63 59
Received payment.

*Receiver.*

118 MEMPHIS, TENN., *June 15th*, 1871.

*Mrs. Bridget Powers to Navy Yard Receiver, Dr.*

For rent of lot No. 10, in navy-yard from Dec. 15, 1870, to June 15th, 1871, six months, at $127.18 per annum..... 63 59
Received payment.

E. McDAVITT, *Receiver.*

MEMPHIS, TENN., *Dec.* 15, 1871.

*Mrs. Bridget Powers to Navy Yard Receiver, Dr.*

For rent of lot No. 10 in navy-yard from June 15th, 1871, to Dec. 15, 1871, six months, at $127.10 per annum.....
Received payment.

R. A. PARKER,
*For Receiver.*

MEMPHIS, TENN., *June 1st*, 1872.

*John Powers, Mrs. Bridget Powers, to Navy Yard Receiver, Dr.*

For rent of lot No. 10 in navy-yard from Dec. 15, 1871, to June 15, 1872, six months, at $127.10 per annum..... 63 55
Received payment.

E. McDAVITT, *Receiver.*

119 MEMPHIS, TENN., *Dec.* 15, 1872.

*Mrs. Bridget Powers to Navy Yard Receiver, Dr.*

For rent of lot No. 10 in navy-yard from June 15, 1872 to Dec. 15, 1872, six months, at $127.10 per annum..... 63 55
Received payment.

E. McDAVITT, *Receiver.*
P.

MEMPHIS, *July* 8, 1873.

Received of T. S. Mallory, C. S. C., sixty-three & $\frac{55}{100}$ dollars for rent due by Bridget Powers.
$63.55.]

E. McDAVITT, *Rec'r.*
P.

THE BANK OF COMMERCE,
*Memphis, Jan'y* 16, 1874.

Rec'd of Mrs. Bridget Powers the sum of sixty-three & $\frac{55}{100}$ dollars, on % navy-yard property—rent.

J. E. MULFORD,
*For Receiver.*

MEMPHIS, TENN., 5 *Aug.*, 1874.

*Mrs. Bridget Powers to Navy Yard Receiver, Dr.*

For rent of lot No. 10 in navy-yard, from 15 Dec., 1873, to 15 June, 1874, six months, at $127.10 per annum..... $63 55

120 Received payment.

E. McDAVITT, *Receiver.*
P. T. HINES.

MEMPHIS, TENN., 12 *July*, 1875.

*M. Bridget Powers to Navy Yard Receiver, Dr.*

For rent of lot No. 10, in navy-yard, from 15' Dec., 1874, to 15' June, 1875, six months, at $127.10 per annum..... $63 55
Received payment.

E. McDAVITT, *Receiver,*
P'r J. H. McDAVITT.

MEMPHIS, TENN., 6' *Jan'y*, 1875.

*M. Bridget Powers to Navy Yard Receiver, Dr.*

For rent of lot No. 10, in navy-yard, from 15' June, 1874, to 15' Dec., 1874, six months, at $127.10 per annum..... $63 55
Received payment.

E. McDAVITT, *Receiver,*
P'r J. H. McDAVITT.

In the circuit court of the United States for the western district of Tennessee.

JOHN C. POWERS & BRIDGET, HIS WIFE, *v.* M. L. ENSMINGER AND OTHERS. } In equity.

121 John C. Powers, one of the plaintiffs in the above cause, makes oath that the receipts hereto attached are genuine, and were given at the times shown by them respectively for the ground rent paid by him for his co-defendant Bridget, under her lease from the city of Memphis on file in the cause. A receipt for one payment has been lost, and cannot be found or produced. After the decree of this court of December, 1873, to wit, in June, 1875, Edgar McDavitt, the receiver of the navy-yard property, appointed to collect the rents thereof, refused to receive further rent under the said lease, and has since refused so to do, and therefore no payments of rent have been made since that falling due in December, 1874.

JOHN C. POWERS.

Subscribed and sworn to this 29th May, 1878.

BELL W. ETHERIDGE, *Clerk.*

122 (Endorsed:) No. 267. John C. Powers and wife v. M. L.

Ensminger and others. Affidavit proving exhibits. Filed May 31, 1878. Bell W. Etheridge, clerk.

123 MEMPHIS, TENN., *June 29th*, 1867.

Received of M. L. Ensminger twenty-seven $\frac{23}{100}$ dollars, State and county tax for the year 1866, on lot No. 10 Chicasaw st., in 5th civil district of Shelby County, listed to G. W. McLain.

PHILIP GAIVIN,
*Tax Collector of Shelby County,*
By GEO. R. POWEL.

MEMPHIS, TENN., *June 29th*, 1867.

Received of M. L. Ensminger seven $\frac{50}{100}$ dollars, special jail tax for 1866, levied by the county court of Shelby County, at its October term, on real and personal property in 5th civil district, listed to G. W. McLean.

PHILIP GAVIN,
*Tax Collector of Shelby County,*
By GEO. R. POWEL.

Received of B. W. Sharp, for M. L. Ensminger, seventeen $\frac{50}{100}$ dollars, State and county tax for the year 1865, on lot 10 Chicasaw st., 55x170, in 5' civil district of Shelby County, listed to G. W. McLean. (R.)
June 28, 1866.

E. J. COMER,
*Tax Collector of Shelby County.*

124 MEMPHIS, TENN., *July 25th*, 1868.

Received of M. L. Ensminger forty-nine $\frac{50}{100}$ dollars, State and county tax for the year 1867, on lot 10 Front st., 55x170, in 5th civil district of Shelby County, listed to him.

PHILLIP GAIVIN,
*Tax Collector Shelby County,*
By GEO. R. POWEL.

10 00
12 50

$22 50

MEMPHIS, TENN., *July 25th*, 1868.

Received of M. L. Ensminger twenty-two and $\frac{50}{100}$ dollars, special railroad bond and special jail tax for 1867, levied by the county court of Shelby County, at its April term, on real and personal property in 5' civil district, listed to him.

PHILIP GAIVIN,
*Tax Collector Shelby County,*
By GEO. R. POWEL.

125 5' district. Folio .

MEMPHIS, TENN., *Oct. 30th*, 1868.

*Mr. M. L. Ensminger, Dr. State and County taxes for* 1868.

| Description of property. | Value. | Amount tax. |
|---|---|---|
| Lot 10 Chicasaw st., 55x170 | 8,000 00 | 96 00 |
| Railroad bond | | 24 00 |
| Jail | | 24 00 |
| Poll | | $144 00 |

Received payment.

WM. McLEAN,
*Tax Collector Shelby County,*
By WM. H. MILLER, *Deputy.*

*Marmaduke L. Ensminger, listed to G. W. McLean, to City of Memphis, Dr.*
*To city tax, thirty-eighth corporate year, ending July 1st,* 1865. *(Rate,* 1–90.)

| Lot. | Block. | C. lot. | Description of property. | Value. | Tax. &c. |
|---|---|---|---|---|---|
| 10 | | | Chickasaw street | 2,700 | 52 80 |

Rec. payment of Kelsey & Sharp.

F. L. WARNER, *T. C.,*
Per F. C. SCHAPER, *Dep't.*

[2. 2. U. S. int. rev. stamp. Canceled. Nov. 6, 1865. 2. 2.]

126 *W. G. McLean to City of Memphis, Dr.*

To city tax, thirty-seventh corporate year, ending July 1, 1864.
(Rate 1—34.)

2. 2. F. L. W. 2. 2.]

| Lot. | Block. | Lot. | Description of property. | Value. | Tax. |
|---|---|---|---|---|---|
| 10 | | | Chickasaw str., 55×170 | 2,700 | 47 25 |

Rec. payment of Marmaduke S. Ensminger, Ap'l 3, 1865.

F. L. WARNER,
*Tax Coll.*

*G. W. McLean to City of Memphis, Dr.*

2. 2. F. L. W. Ap'l 3, 1865. 2. 2.]

To city tax, thirty-sixth corporate year, ending July 1, 1863.

| Lot. | Block C. | Lot. | Description of property. | Value. | Tax. |
|---|---|---|---|---|---|
| 10 | | | Chickasaw str | 2,700 | 947 25 |

Rec. payment of Marmaduke S. Ensminger, April 3, 1865.

F. L. WARNER,
*Tax Coll.*

*G. W. McLean, to City of Memphis, Dr.*

2. 2. F. L. W. Ap'l 3, 1865. 2. 2.]

To city tax, thirty-fifth corporate year, ending July 1, 1862.

| Lot. | Block C. | Lot. | Description of property. | Value. | Tax. |
|---|---|---|---|---|---|
| 10 | ..... | ..... | Chickasaw str..... | 3,060 | 55 63 |

Rec. payment of Marmaduke S. Ensminger, April 3, 1865.
F. L. WARNER, *Tax Coll.*

127 *G. W. McLean to City of Memphis, Dr.*

2. 2. F. L. W. Ap'l 3, '65. 2. 2.]

To city tax, thirty-fourth corporate year, ending July 1, 1861.

| Lot | Block C. | Lot. | Description of property. | Value. | Tax. |
|---|---|---|---|---|---|
| 10 | ..... | ..... | Chickasaw ..... | 3,600 | 64 80 |

Rec. payment of Marmaduke, S. Ensminger, April 3, 1865.
F. L. WARNER,
*Tax Coll.*

***Taxes and assessments on lot No 10, Chickasaw street, navy-yard sub. div.***

| To whom assessed. | Year. | Val. | Tax. | By whom paid. |
|---|---|---|---|---|
| G. W. McLean ..... | 1860 | $2,700 | $8 10 | Book does not show. |
| Do ..... | 1865 | ..... | 17 50 | M. S. Ensminger. |
| Do ..... | 1866 | ..... | 34 75 | Do. |
| Do ..... | 1867 | ..... | 71 50 | Do. |
| M. S. Ensminger ..... | 1868 | 8,000 | 144 00 | Do. |
| Do ..... | 1869 | 9,200 | 178 40 | E. McDavitt, rec'r. |
| Do ..... | 1870 | 7,500 | 83 69 | Do. |
| Do ..... | 1871 | 9,000 | 208 75 | Do. |
| Do ..... | 1873 | 8,400 | 153 12 | Do. |
| Do ..... | 1875 | 4,500 | 56 25 | Do. |

There was no assessment for 1861, as real estate prior to the war was only assessed every two years. All State and county taxes were remitted for the years 1862, 1863, and 1864; also all taxes remaining unpaid prior thereto, by act of legislature. The city has assessed said
128 lot every year for taxes since 1865, but they are still unpaid.

129 U. S. circuit court, western district Tenn. Equity side.

J. C. POWERS ET AL.
*vs.*
M. L. ENSMINGER ET AL. } 267. Equity.

Deposition of J. J. Sears, a witness examined on part of def'ts, by consent of parties to be read in evidence upon the trial of this cause, subject only to exceptions for want of competency and relevancy:

Ques. 1. What is your name, age, and residence; are you acquainted

with the parties to this cause, and what connection or interest, if any, have you in this suit?

Ans. J. J. Sears; forty-nine years; near Memphis, Tenn; am acquainted with the parties to the cause; I am only agent of def't Ensminger.

Ques. 2d. State, if you know, the location of the property herein sued for, to wit, lot 10, your means of knowledge, and where located.

130 Ans. I do. I have been in the abstract business in the city of Memphis, and am familiar with all the real estate in said city; there is but one lot 10 in the navy-yard division, which is the one here mentioned, and it is of the property included in the Nos. from 1 to 24, mentioned in comp'ts' bill, those Nos. 1 from 1 to 24 being the original Nos. distinguished by the proprietors of Memphis, but have since been resubdivided by the city, and the lots made larger; this lot 10 fronts on Promenade st., and runs back eastwardly to Chickasaw st., and south of Jackson st.

Ques. 3. Is this property, lot 10, within that dedicated by the original proprietors of the city of Memphis to said city?

Ans. It is not; the property granted in this dedication referred to is all one hundred & eighty feet north of a prolongation of the north line of lot 10, and west of a prolongation of the western line.

131 Ques. 4th. Examine the Exhibit B to Ensminger's answer, and state if the same is a correct copy of the original certificate under which Ensminger claims this property. What has become of the original of which this is a copy; have you made diligent search for the same, and where did you last see it?

Ans. I have examined this exhibit; it is a correct copy; the original was filed in the case of the city of Memphis vs. Ensminger et al., No. 89, of this court. I have made diligent search for the same and cannot find it. I last saw it among the papers of said case, No. 89 I think.

Ques. 5. Did comp't Bridget Powers, or anyone for her, comply with that clause of her lease from the city of Memphis in which she obligated herself to pay a certain rent to said lessor? If you state that she did not, give your means of knowledge.

Ans. I was agent for Ensminger as to this property, and Pow-
132 ers would frequently ask me when meeting him as to the prospects of the case being decided, then pending between himself and Ensminger; and about twelve months before we got possession told me that he did not intend to pay any more rent to the city, as the property might be taken from him, and he could not recover from the city as it was about bankrupt.

Ques. 6. Was this property, to wit, lot 10, assessed for taxation; if so, when did said assessment commence—was any of said taxes paid by def'ts?

Ans. I find that this property was assessed for taxation by the city as far back as 1861 for that year, and the following years up to and including 1865; it was assessed to G. W. McLean, who seems to have been a lessee of the city. None of the tax was paid for these years, and in 1865, after Ensminger had purchased under the tax sale aforesaid, he paid up all of these taxes, and I hereby file the tax receipts taken for such pay-
133 ments. I made no examination as to assessment prior to 1861.

(Objected to as incompetent.)

Ques. 7. Have you made any examination as to the assessment of this property subsequent to 1865?

Ans. I have, and here file exact copies from the assessment and tax-books for such years as I have been able to find.

(Objected to as incompetent.)

Ques. 8. What army or force had possession of the city *the city* of Memphis and the surrounding country in June, 1864? How long had said army been in possession of said country at said date, and how did they retain it afterwards?

Ans. I first came to Memphis in July, 1862, at which time the Federal Army had charge and control of the city of Memphis and surrounding country. I remained about two months, and returned again March 11, 1863, when I found them still in possession, and they retained
134 control and possession until the close of the war. I have resided in Memphis since my return, in 1863.

Ques. 9. How far from the city of Memphis were the nearest Confederal forces or detachment of soldiers, and how far did the Federal lines extend?

Ans. I never heard of any regular detachment or body of Confederate soldiers being permanently located in West Tennessee since 1863; there were occasional raiding parties, but they would not remain long in any one place. The Federal picket lines that occupied Memphis was about three miles each way from Court square. This lot is located northwest of Court square, about half a mile from it, and rather between it and the Mississippi River.

Ques. 10. Does the tax certificate before referred to as exhibit to def'ts' answer properly identify this property, and could you locate it from said description?

135 Ans. It does, and no one could have any difficulty in locating the property from said description.

(Testimony objected to as incompetent and irrelevant, and not waiving such objections the plaintiffs cross-examine as follows:)

Que. 1. Where does Ensminger, the defendant, reside?

Ans. He resides at Cairo, Illinois.

Que. 2. What was the depth from east to west of the original lots of the city of Memphis from one to twenty-four (1–24)?

Ans. One hundred and forty-eight feet six inches.

Qu. 3. What is the depth of lot ten (10) in controversy? Is that of the same depth as the other lots of the navy-yard laid out on lots from 1 to 24?

Ans. One hundred and seventy feet. It is the same depth of the other lots laid out from lots 1 to 24.

136 Q. 4. Is lot ten (10) now in controversy a part of the navy-yard granted by the act of Congress of August, 1853, to the city of Memphis?

Ans. I presume it is.

Q. 5. Was not lot ten (10) above spoken of occupied when you first knew it; if so, how?

Ans. There were no improvements on it when I first knew. There was a part of a fence on one end, which looked as though the fence had been

torn away recently. Some posts were standing. There possibly might also have been posts at the other end.

Q. 6. How long since you first knew the lot and how long since improvements were first put on it, and by whom?

Ans. I have only known the lot since about the year 1865. I think, in the year 1867 the frame building was being put upon the lot by Mr. Powers, or Mrs. Powers. This was 1866 or 1867. I do not know
137 who put the brick building on the lot. It was put there a year or two after the frame buildings.

Q. 7. Did you ever know any one to assert a claim as owner or lessee of the lot before Powers put the buildings on it?

Ans. No, sir; I did not come to be agent for Mr. Ensminger till about the time the building was being put there by Powers.

Q. 8. Did you ever know G. W. McLean, or hear that he had a claim to the lot?

Ans. No, sir.

Q. 9. Were you in Memphis in 1861?

Ans. No, sir; I came here first in July, 1862, and was here permanently from March, 1863; but I was in the Army, and did not know much about the citizens till 1865.

Q. 10. Have you ever known any city taxes paid on lot ten (10)?

Ans. Yes, sir; I know by the receipts I have seen. I do not think I ever paid any. I know the city also has back taxes, charged on
138 the books against the lot remaining unpaid; at least this was so when I examined.

Q. 11. Has not the navy-yard been subdivided into lots and have not these lots been numbered and are not these lots usually known by such numbers?

Ans. Yes, sir.

Q. 13. From what number to what number do the navy-yard lots run?

Ans. I think they run from No. 1 to No. 67.

Q. 13. Was not the city originally divided into lots and those lots also numbered and are not the lots yet known by such numbers?

Ans. The city was subdivided into lots, and the lots were numbered, and the lots are yet known by such numbers. But lots from 1 to 24, each inclusive, have been extinguished by being merged into the navy-yard property, and there are now no lots in the city proper designated by those numbers.

139 Q. 14. How are lots in the navy-yard usually designated?

Ans. Those on Chickasaw street, the first thirty lots, are sometimes called city lots, and sometimes navy-yard lots. The others are called navy-yard lots altogether. They are designated by the numbers.

Q. 15. Do you copy the description of the lot in controversy from the assessment of Shelby County, for 1860, in exact words?

Ans. Yes.

Q. 16. Is there any such heading to that assessment as you have, to wit, taxes and assessments on lot 10, Chickasaw street, navy-yard subdi'n?

Ans. No; that is just a report of what I found on the tax books in the tax offices. I did not copy anything from the books, except only the owners or parties to whom assessed, and the amounts in dollars and cents for the different years.

Q. 17. Have you any interest in the lot or in the street?

140 Ans. No, sir; only as agent of Ensminger. I never invested a dollar in the lot on my own account.

Q. 18. Do you know in what form and for what length of time the lot was advertized before being sold by the U. S. district tax com'rs?

Ans. It was advertized in a supplement to the Memphis Appeal, a newspaper then published in Memphis. I do not know how long, nor how many times. I used to see the advertisement frequently, being then encamped outside the city.

Q. 19. How much of Shelby County did the military forces of the U. S. occupy in June, 1864, and for 3 or 4 months before that time?

Ans. I suppose they occupied the whole, I do not know of any enemy anywhere in the country. The picket lines of the Army extended out from the city three or four miles.

Q. 20. Did the Federal military forces ever occupy lot ten (10), in contoversy in this suit; if so, when?

141 Ans. When I first saw it, it had the appearance of having had tents on it, but I don't recollect having ever seen any there.

Q. 21. What rule, if any, had the U. S. district tax commissioners, in reference to selling property for direct taxes, which was occupied by the United States?

Ans. The' sold all except the list of buildings furnished by the quartermaster, as occupied by the government. And in some cases I think some of those were sold.

Q. 22. Was it declared by the district tax commissioners to be their purpose to sell property occupied by the government?

Ans. It was not to my knowledge. My understanding was, that it was merely an accommodation on their part to other Federal officers occupying buildings to withhold any from sale. I recollect now that I heard the commissioners say they would sell all the property, and where the

142 government was in possession the purchasers must get possession from the government. I knew of no exemptions from sale of the property in the city.

Q. 23. Did you buy this property at the sale by the district tax commissioners for Ensminger?

Ans. I did not. Kelsey and Sharp, att'ys here at that time, bought it for him.

Q. 24. If the lots of the navy-yard, on the ground formerly included in lots from 1 to 24 of the original city, between Promenade and Front streets, are of a greater depth than said lots from 1 to 24 were, from what was the additional ground?

Ans. Taken, I suppose, from the ground orginally designated as the public landing, but donated afterwards by the original proprietors and the city to the United States for a naval depot.

Re-examined by def't:

Ques. 1. Please explain how it is that the lots from No. 1 to 24,

143 inclusive, were originally only 148½ feet deep, and are now 170 feet.

Ans. After a donation of the public landing to the city by the original proprietors, the city of Memphis purchased these lots from 1 to 24 from private parties, they being only 148½ feet deep and fronting on the prop-

erty donated as aforesaid. The city donated to U. S., for a navy-yard, this property, both that purchased & donated to it. The U. S. Government returned some to the city, as shown in the pleadings. After this the city had a resubdivision of these lots, and made them 170 feet deep instead of 148½. As thus divided, this lot was sold at U. S. district tax sale, and leased by city to comp't, as shown in this bill; and as thus divided it had been previously leased to McLean, in about the year of 1855, by the city, as I understand.

(Objected to as incompetent.)

Recross-examination:

Qu. 1. Have you any personal knowledge of any lease of the lot
144 by the city to McLean in 1855, or at any other time?

Ans. No, sir. My information is only from Mr. Canavan, who told me there was such a man here, and that he had a lease of the lot. I have seen of record in the register's office other leases of other lots in the navy-yard by the city, made in or about the year 1855.

(Objected to as incompetent.)

J. J. SEARS.

Subscribed and sworn to before me this May 25, '78.

L. H. PILLSBURY, *D. C.*

(Endorsed:) No. 267. Equity. Circuit court of the United States, western district of Tennessee. John McMahon vs. M. L. Ensminger et als. Deposition of J. J. Sears. Returned & filed May 31st, 1878. H. E. Andrews, clerk, by L. H. Pillsbury, d. c.

145 UNITED STATES OF AMERICA,
*Western District of Tennessee:*

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judic'al circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its Nov. term, A. D. 1878, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 19' day of Dec., A. D. 1878. in the following cause, to wit:

JOHN C. POWERS ET AL., PLAINTIFF;
*vs.*
M. L. ENSMINGER ET ALS., DEFENDANT. } No. 267.

This cause was this day heard on the pleadings and the proofs on file, before the honorable John Baxter, the circuit judge presiding, and was argued by counsel; and thereupon, upon consideration thereof, it is now ordered, adjudged, and decreed as follows, viz: That the decree herein pronounced on the 20th day of December, 1873, in the suit wherein the
City of Memphis and Bridget Powers were plaintiffs, and the de-
146 fendants here, Ensminger and Sears, were defendants, declaring the title to the lot described in the bill herein, to wit, lot ten (10), beginning at the northeast corner of lot nine (9), running thence and parallel with Chickasnaw street fifty-five (55) feet and $\frac{31}{100}$ to the southeast corner

of lot eleven (11), thence running west one hundred and seventy (170) feet to Promenade street, thence running south and parallel with Promenade street fifty-five (55) and $\frac{31}{100}$ to the northwest corner of lot No. nine (9), and thence running east one hundred and seventy (170) feet to the point of beginning, being a lot on the plan of the subdivision of the navy-yard property in the City of Memphis, and a part of the ground dedicated by the original proprietors of the ground whereon the City of Memphis stands, as and for a public landing or landings for public purposes of navigation and trade, as acquired by the defendant Ensminger by his purchase, as evidenced by his certificate of purchase No. 988 appearing in the record, at a
147 sale of lands for unpaid taxes under and by virtue of the act of Congress entitled "An act for the collection of direct taxes in insurrectionary districts of the United States and for other purposes," and the act amending the same, held at Memphis, Tennessee, on the 24th day of June, A. D. 1864, by the direct tax commissioners of the United States for the State of Tennessee, to be good and indefeasible, dismissing the bill aforesaid of the City of Memphis and Bridget Powers, seeking to have the sale to and purchase by the said Ensminger of the said lot, so made as aforesaid, set aside, cancelled, and annulled, ordering a writ of possession to put the said Ensminger into the peaceable possession of the said lot, and directing a reference to the clerk to take and state an account of the damages the said Ensminger had sustained by the suing out of the injunction under the said bill, and the decree pronounced
148 herein on the 19th day of July, 1876, in the same suit aforesaid, upon the filing of the mandate of the Supreme Court of the United States, dismissing the bill in the said suit, adjudging the title of the said Ensminger to the said lot as so acquired by him, as aforesaid, to be good, awarding a writ of possession to put him in possession thereof, and directing a reference to the clerk to ascertain the damages the said Ensminger had sustained by reason of the suing out of the said injunction in the said suit; which said two decrees more fully and at length appear by reference to the same now appearing of record in court here; be and the same are hereby severally reversed, vacated, set aside, and cancelled, and that the plaintiffs herein as against the defendants be restored to all they have lost under and by virtue of the said decrees, or
149 either of them, and the process which has been issued thereunder. And it is further ordered, adjudged, and decreed that the plaintiff Bridget Powers has a good and indefeasible right and title, as against the defendants, and each of them, for the term of her lease from the City of Memphis, as the same appears by the record, in and to the said lot (10), more fully herebefore described, subject only to the terms and conditions of the said lease. That the said defendant Ensminger, be perpetually enjoined from setting up or asserting any title to the said lot ten (10) under or by virtue of the tax-sale certificate No. 988, so granted by the said United States direct tax commissioners to the said defendant Ensminger, and the sale evidenced thereby. That the lease of the said lot ten (10), made by the defendants to the plaintiff John C. Powers, on the 19th day of July, 1876, and the five (5) notes for twenty-five dollars
150 each, executed to the said defendants, by the said John C. Powers, for the rent to accrue under and in pursuance of such lease, now standing out, all as more fully appears in the record, be delivered up by

the said defendants, and the same are hereby severally cancelled, vacated, and declared void; and, if the said defendants have negotiated or collected any of the said notes, or shall fail to deliver them up to be cancelled, as herein decreed, then the said defendants shall pay to the plaintiffs the amounts of the notes the said defendants have so negotiated or collected, or fail to deliver up, and interest thereon from the times respectively when they severally fell due; and, if necessary, or desired by the plaintiffs, an account may be taken and stated of the sum so due on account of the said notes not delivered up. That the taxes the said Ensminger has paid on the said lot ten (10) be
151 repaid him by the plaintiffs, if any he has paid, and that an account of the same be taken, if necessary, or he desires it, and that he be allowed credit on the sums he may owe for such sums so due him for taxes, and if such sum exceed the sum he owes, that he have a decree for the balance, which balance so decreed shall be a lien on the property; that the injunction herein awarded and issued be made perpetual; that a writ of possession issue, if required, to put the plaintiffs in possession of the said lot ten (10), or any part thereof, that may be held by the said defendants or their tenants, and that the possession by the plaintiffs of the same, or any part thereof they may be in possession of, be quieted and confirmed under and in accordance with their lease from the City of Memphis,
152 described in the record, and that the plaintiffs have and *and* recover of and from the said defendants all the costs of this suit, and of the suit hereinbefore mentioned of the City of Memphis and Bridget Powers against the said defendants, wherein the said two decrees have been recovered and set aside, as aforesaid, which said costs the clerk is hereby directed to tax, and that execution issue therefor. And it being made to appear to the court that the defendant J. J. Sears has departed life since *since* the cause was submitted, it is ordered that the cause as to him stand and be abated.

From this decree the defendants pray an appeal to the next term of the Supreme Court, which is granted upon the appellant giving bond, with security, for five hundred dollars, to be approved by the clerk of this court.

153 UNITED STATES OF AMERICA,
*Western District of Tennessee:*

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judical circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov. term, A. D. 1878, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 19' day of Dec. A. D. 1878, in the following cause, to wit:

JOHN C. POWERS ET AL., PLAINTIFF',
vs. } No. 267.
M. L. ENSMINGER ET ALS., DEFENDANT'.

In this cause a decree having already been pronounced at the present term, whereby the plaintiffs recovered of the defendants Ensminger lot ten

(10) of the navy-yard, in the city of Memphis, more fully described in the record. Now, on the application of William M. Randolph, E. S. Hammond, and Jordan, who have conducted the suit on the part of the
154 plaintiffs as their solicitors and counsel, it is ordered and decreed by the court, the Hon. John Baxter, the circuit judge alone presiding, that the said Randolph, Hammond and Jordan have and are entitled to a lien on the interest of the plaintiffs in the said lot for their reasonable fees for their services in the said suit, the amount of the said fees to be fixed and the said lien to be enforced according to law.

154*a* Supreme Court of the United States.

Know all men by these presents that we, Marmaduke L. Ensminger and George Gillham, are held and firmly bound unto John C. Powers and Bridget Powers in the sum of five hundred dollars to be paid to the said John C. and Bridget Powers, executors or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, dated this 14th day of January, 1879.

Whereas the above named Marmaduke D. Ensminger hath prosecuted a writ of error appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the western district of Tennessee:

Now, therefore, the consideration of this obligation is such that if the above-named Marmaduke L. Ensminger shall prosecute his said writ of error appeal to effect, and answer all costs adjudged against him if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

MARMADUKE L. ENSMINGER. [SEAL.]
GEO. GILLHAM. [SEAL.]

Acknowledged before me this 14th day of Jan'y, 1879.

BELL W. ETHERIDGE, *Clerk.*
, *D. C.*

154*b* (Endorsed:) No. 267. Circuit court of the United States, western district of Tennessee. John C. Powers and wife vs. M. L. Ensminger et als. Appeal bond 20. United States Supreme Court. Filed the 14th day of Jan'y, A. D. 1879. Bell W. Etheridge, clerk.

155 JOHN C. POWERS ET AL. *vs.* M. L. ENSMINGER ET AL. } 267. Equity.

In the circuit court of the United States for the western district of Tennessee.

The deposition of Moses S. Lord, taken by consent, and to be read as evidence on behalf of complainant herein; all formalities waived, and deposition taken subject to exceptions for competency and relevancy.

Said witness being duly sworn, deposes as follows:

Int'y 1. Please state your name and residence, and where you lived in 1876.

Ans. My name is Moses S. Lord; residence, Memphis; I lived in Memphis in 1876.

Int'y 2d. Please state whether you ever rented 84 Promenade
156 street, Memphis, Tenn., from J. J. Sears, as agent of W. L. Ensminger; and, if so, when, and under what circumstances; to whom did you pay rent, and how much?

Ans. In 1876 I rented the house and lot No. 84 Promenade street, Memphis, from Mrs. Powers, the complainant herein. Some time in July, 1876, Mr. J. J. Sears, acting as agent of M. L. Ensminger, claimed the property under some United States tax title. I then leased the house from him as such agent at the rate of $25 per month. I have four receipts for rent paid Sears, for rent from July 20, 1876, to Dec. 19, '76, each of these receipts for $25 *dollars*. I had another receipt for rent from Sept. 20 to Oct. 19th, 1876, $25. This receipt is lost, but the rent was paid. The five receipts, including the one lost, $25 each, show the rents paid by me, and the five receipts are together for rent from July 20, '76, to Dec. 19, '76.

I annex the said five receipts to this deposition as Exhibits 1, 2, 3, & 4.

M. S. LORD.

Subscribed & sworn to before me May 7th, 1879.

BELL W. ETHERIDGE, *Clerk*.

157 EXHIBIT No. 1.

$25.] MEMPHIS, TENN., *Aug. 8th*, 1876.

Received from M. S. Lord twenty-five dollars for rent of the following premises: On east side of Promenade street, south tenement on lot 10, navy-yard, Memphis, for one month, from Aug. 20 to Sept. 19th, '76, inclusive.

J. J. SEARS,
*Ag't for M. L. Ensminger.*

*Exhibit No. 2 to Lord's deposition.*

$25.00.] MEMPHIS, TENN., *Sept. 20th*, 1876.

Received from M. S. Lord twenty-five dollars for rent of the following premises: On Promenade street, south part of lot 10, navy-yard, Memphis, for one month, from Aug. 20 to Sept. 19th, '76, inclusive.

J. J. SEARS,
*Ag't for M. L. Ensminger.*

*Exhibit No. 3 to Lord's deposition.*

$25.00.] MEMPHIS, TENN., *Nov. 28*, 1876.

Received from M. S. Lord twenty-five dollars for rent of the following premises: On Promenade street, south part of lot 10, navy-yard, Memphis, for one month, from Oct. 20 to Nov. 19, '76, inclusive.

J. J. SEARS, *Agent.*

*Exhibit No. 4 to Lord's deposition.*

$25.00.] MEMPHIS, TENN., *Dec'r 20th*, 1876.

Received from M. S. Lord twenty dollars for rent of the following premises: House on Promenade street, south p't lot 10, navy-yard,
158 Memphis, for one month, from Nov. 20th to Dec. 19, '76, inclusive.

J. J. SEARS, *Agent.*

(Endorsed:) J. C. Power et al. vs. M. L. Ensminger et als. Deposition of M. S. Lord. Filed May 7th, 1879. Bell W. Etheridge, clerk.

159 J. C. POWERS ET ALS. *vs.* M. L. ENSMINGER ET ALS. } 267. In equity.

In the circuit court of the United States for the western district of Tennessee.

The deposition of Bridget Powers, taken by consent and to be read as evidence on behalf of complainant herein. All formalities waived and deposition taken subject only to exception for competency and relevancy.

Said witness, being duly sworn, deposes as follows:

Int'y 1. State your name and residence, and whether or not you are the Bridget Powers complainant in this suit.

Ans. Bridget Powers; residence, Memphis, Tennessee; and I am party complainant to this suit.

Int'y 2. Please state whether you an' J. C. Powers, or either of
160 you, ever rented No. 82 & 84 Promenade street, Memphis, Tennessee, from J. J. Sears or W. L. Ensminger; and, if so, for how long, and under what circumstances. Is this the property mentioned and described in the bill herein?

Ans. The house and lot No. 82 & 84 Promenade street, Memphis, is the house and lot in dispute in this suit. I leased the lot from the city of Memphis for a long number of years. I forget how many just now, and I had put up on this lot the house and improvements on it. In the year 1876, in July, I think Mr. J. J. Sears, acting as agent of N. S. Ensminger, had some claim against this property under a United States tax title, and was about to have Mr. Powers & myself put out of the property by virtue of some writ that he had from some court. The United States marshal of this district had the writ. Under these circumstances we,
161 to keep possession of the property, agreed to rent of Sears as agent of Ensminger. The notes that were given for this rent were for $25 each, & three of them were paid to Sears.

These three notes fell due Aug., Sept., & Oct. 20, '76, respectively. Two of them were July 25, '76, & one July 26, '76. These notes were for rent of 82 Promenade street. The house 82 & 84 Promenade street is a double tenement.

This rent was paid to Mr. Sears by myself on two of those notes, & by my daughter, who got the money from me and paid Sears, on the other.

The notes were taken up from Sears, who had them. For a portion of the time I refused to pay rent, but did pay these three notes. I attach the notes as Exhibits 1, 2, 3.

Int'y 3d. Please state whether or not Sears, as agent of Ensminger, rented No. 84 Promenade street, and what rents he collected, if you know.

Ans. M. S. Lord had rented 84 Promenade street of me before
162 Sears, as agent, had claimed the property under the tax title. He then rented of Sears, and continued to rent until the property was decreed to me by decree of the court. After this he again rented of me. Mr. Lord paid rent to me Sears, at rate of $25 per month from July 20, '76, to Dec. 19, '76, five months, & has receipts for same.

BRIDGET POWERS.

Cross-examination waived.

MYERS & SNEED.

Subscribed & sworn to before me May 7th, 1879.

BELL W. ETHERIDGE, *Clerk.*

[Vignette.] [Cut.]

Dolls. .] MEMPHIS, TENN., *July* 26, 1876.

Aug. 20th, after date, I promise to pay to the order of J. J. Sears twenty-five $\frac{00}{100}$ dollars, at his office in the court-house building. Value received.

JOHN C. POWERS.

To

No. .]

J. S. Hatcher & Co., stationers, Memphis, Tenn.

(Indorsed:)

Paid Aug. 21, '76.

J. J. SEARS.

Paid Aug. 21, '76.

J. J. SEARS.

Exhibit one, to Bridget Powers' deposition.

[Vignette.] [Cut.]

Dolls. .] MEMPHIS, TENN., *July 25th*, 1876.

Sept. 20th, after date, I promise to pay to the order of J. J. Sears twenty-five $\frac{00}{100}$ dollars, at his office in the court-house building. Value received.

JOHN C. POWERS.

To

No. .]

J. S. Hatcher & Co., stationers, Memphis, Tenn.

(Indorsed:)

Paid Sept. 21, '76.

J. J. SEARS.

Exhibit 2, to Bridget Powers' deposition.

[Vignette.] [Cut.]
Dolls. 25.00.] MEMPHIS, TENN., *July* 25, 1876.

Oct. 20th, after date, I promise to pay to the order of J. J. Sears twenty-five $\frac{00}{100}$ dollars, at his office in the court-house building. Value received.

JOHN C. POWERS.

To
No. .]

J. S. Hatcher & Co., stationers, Memphis, Tenn.

(Indorsed:)

Paid on this note twenty dollars, Nov. 21st, 1876.

J. J. SEARS.

Exhibit 3, to Bridget Powers' deposition.

163 UNITED STATES OF AMERICA,
*Western District of Tennessee:*

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judicial circuit thereof.

To the honorable John Baxter, judge of said court:

In pursuance of a decretal order of said court, made at a regular term thereof, begun and held for its Novem. term, A. D. 1878, at the United States court rooms, in the city of Memphis, in said district, on, to wit, the 19th day of Decem., A. D. 1878, by which order it was referred to Bell W. Etheridge to take and state an account between the parties to the following styled cause, to wit:

JOHN C. POWERS AND BRIDGET POWERS,
plaintiffs,
*vs.*
M. L. ENSMINGER, DEFENDANTS.

I, Bell W. Etheridge, do respectfully report that I have proceeded to investigate the matters so referred to me, and that pursuant to notices duly issued by me I have been attended by counsel for plaintiffs and defendants, and after taking due proofs I find and report that the amount of taxes paid by said defendant, M. L. Ensminger, on lot 10, block , Chickasaw street, navy-yard subdivision of the city of Memphis, to be the sum, with interest to May 1st, 1879, of nine hundred and thirty-four $\frac{38}{100}$
164 dollars, as exhibited by the following table of taxes paid by M. L. Ensminger:

| Date of payment. | Taxes for year. | Amount of taxes. | Interest to May 1st, 1879. | Total. |
|---|---|---|---|---|
| April 1st, 1865 | 1861 | 64 80 | 54 72 | 119 52 |
| Do. do. | 1862 | 55 63 | 46 98 | 102 61 |
| Do. do. | 1863 | 47 25 | 39 90 | 87 15 |
| Do. do. | 1864 | 47 25 | 39 90 | 87 15 |
| November 6th, 1865 | 1865 | 52 80 | 42 72 | 95 52 |
| June 28th, 1866 | 1865 | 17 50 | 13 48 | 30 98 |
| Do. 29th, 1867 | 1866 | 34 75 | 24 68 | 59 43 |
| July 25th, 1868 | 1867 | 71 50 | 45 00 | 117 30 |
| October 25th, 1868 | 1868 | 144 00 | 90 72 | 234 72 |
| Total | | | | $934 38 |

The following shows the amount of rents paid by John C. Powers:

| Date of payment. | Amount. | Interest to May 1st, 1879. | Total. |
|---|---|---|---|
| August 20th, 1876 | 25 00 | 4 04 | 29 04 |
| September 20th, 1876 | 25 00 | 3 92 | 28 92 |
| October 29th 1876 | 25 00 | 3 80 | 28 80 |
| Total | | | $86 76 |

These payments were made originally by notes of Jno. C. Pow-
165 ers, of twenty-five dollars each, due respectively at the dates of payment above, and taken up at maturity. Therefore the defendant should recover of the plaintiffs the aforesaid sum of $934.38. But as a set-off to this amount plaintiffs have paid rents, including interest, amounting to the sum of $86.76, leaving a balance in favor of the defendant of the sum of $847.62.

I do therefore respectfully report that the defendant herein should recover of plaintiffs the sum of eight hundred and forty-seven $\frac{62}{100}$ dollars. I respectfully refer to deposition herein as making a part of this report.

All of which is respectfully submitted.

May 14th, 1879.

BELL W. ETHERIDGE,
*Clerk & Master.*

(Endorsed:) No. 267. Equity. Circuit court of the United States, western district of Tennessee. John C. Powers et al. vs. M. L. Ensminger et al. Report of Bell W. Etheridge, clerk & master. Filed 14th day of May, 1879.

BELL W. ETHERIDGE, *Clerk.*

166 In circuit court of U. S., western dist. of Tenn.

JOHN C. POWERS & BRIDGET POWERS
*vs.*
M. L. ENSMINGER. } No. 267.

Complainants, John C. Powers and Bridget Powers, except to the report of the clerk and master filed herein on May 14, 1879, for the following reasons:

1st. The clerk has credited Ensminger and charged complainants with taxes for the years 1861, 1862, 1864, 1865, 1865, 1866, and interest on the same. The proof shows that complainants are simply lessees of the property, their lease having commenced Feb'y 28, 1866. They are not chargeable with taxes before the beginning of lease.

2d. The taxes allowed by the clerk for the years 1861, 1862, 1863, 1864, and the first item of 1865 were city taxes, as shown in Sears' deposition, purporting to be due to the city of Memphis. The city of
167 Memphis, as shown by the proof and the *and* this property. The city could not lawfully tax its own property. The payment of taxes therefore to it by Ensminger or others for him was unnecessary & improper, and credit should not be allowed.

3d. Because the clerk fails to charge def'ts with the rent paid by Moses S. Lord, as shown by his deposition. The rents so paid were for five months, at $25 per month.

4th. The State & county taxes for the years 1865 and 1866 cannot be allowed defendants, for the reason that section 68 of article 4 of city charter, passed by the legislature of the State of Tennessee, specially exempts from State & county taxes such parts of the navy-yard as are not leased. At the time of the accruing of these taxes this property was a part of the navy-yard, and was not leased.

5th. Because the clerk has allowed interest on all the items of taxes to defendants.

168 6th. Because the city taxes were payable in the city scrip, the county taxes in county scrip, and the State taxes in Tennessee money, all three of which were below par, and there is no testimony whatever showing the real value of such city & county scrip and Tennessee money.

WM. M. RANDOLPH,
*Sol. for Pl'ffs.*

(Indorsed:) No. 267. Circuit court of the United States, western district of Tennessee. Powers et al. vs. Ensminger et al. Exceptions to clerk's report. Filed June 20th, 1879. Bell W. Etheridge, clerk. W. B. Weisiger, d. c.

169–172 THE UNITED STATES OF AMERICA,
*Sixth circuit and District of West Tennessee:*

I, Bell W. Etheridge, clerk of the circuit court of the United States for said district of West Tennessee, do hereby certify that the paper hereto attached is a full, true, perfect, and correct copy of the original record and proceedings in said court as the same now appears of record and upon the files in my office in the following cause, to wit: John C. Powers and Bridget Powers vs. M. L. Ensminger, J. J. Sears, and City of Memphis.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office in the city of Memphis, this day of , A. D. 187 , and of the Independence of the United States the year.

[SEAL.] BELL W. ETHERIDGE, *Clerk.*
, *D. C.*

(Indorsed:) No. 267. Circuit court of the United States, district of West Tennessee. John C. Powers and Bridget, his wife, vs. M. L. Ensminger et als.

173 Proceedings of the circuit court of the United States for the sixth circuit and district of West Tennessee, at a regular term of said court held for its November term, A. D. 1873.

*Injunction bill.*

MAYOR & ALDERMAN OF THE CITY OF MEMPHIS et al., plaintiffs,
*vs.*
M. L. ENSMINGER & J. J. SEARS, DEFENDANTS.

STATE OF TENNESSEE,
*Shelby County:*

To the judges of the circuit court for the U. S. for the sixth circuit and district of West Tennessee:

The Board of Mayor and Alderman of the City of Memphis, a corporation of the State of Tennessee, chartered by the legislature of said State, and having an existence in the county of Shelby by its mayor, W. O. Lofland, and Bridget Powers, also residents and citizens of said
174 State, bring their bill against Marmaduke L. Ensminger, a non-resident of Tennessee, but of the State of Illinois, and J. J. Sears, agent, of the city of Memphis.

Humbly complaining, your orators would respectfully represent unto your honor that the city of Memphis is the owner in fee of a large and valuable landed property in said city, known as the navy-yard, embracing about seventy-five acres of land lying between the Mississippi and Wolf Rivers, was in 1844 dedicated by the original proprietors and owners of said land to the Government of the United States in fee to be used by said government for naval purposes. And in accordance with said dedication said land was improved by the erection of buildings, &c., and designated as a navy-yard. And that subsequently, to wit, on the , 1854 or '55, the Government of the U. S. donated to the City of Memphis said navy-yard in fee, with all the buildings and ap-
175 purtenances thereto belonging. And that the city of Memphis, after said donation, entered into possession of said premises, and being the owner of said grounds, has, on different days, leased lots of the same to different parties and citizens of said county and State. And that in accordance with said plan of making the navy-yard pay to the city annual revenue, the said city did, on the 28th Feb'y, 1866, lease one of said lots to your orator, Bridget Powers, for the space of twenty years, which

lot is designated as lot No. ten (10) on the map of said navy-yard, and which will be shown to the court on the trial of said cause. And that your orator under said lease took possession of the same, and has been in the peaceable possession thereof since said date. A copy of said lease will be filed before final hearing of this cause. Your orators further
176 represent unto your honors that the defendant Marmaduke Ensinger and his agent, J. J. Sears, are setting up some pretended claim to this real estate as a purchaser at a pretended sale of the same made by the United States direct tax commissioners for the insurrectionary district of Tennessee, in the month of June, 1864, and has actually procured the said tax commissioners to issue a writ of possession to him for said land, which was issued on the 30th day of April, 1867.

And which writ is now in the hands of the marshal/ of West Tennessee, who will proceed to execute the same by ousting your orator from the same and placing the said Ensminger, or his agent, J. J. Sears, in possession of the same, unless restrained by the injunction process of this court.

Your orators allege that the said tax sale was entirely null and
177 void and communicated no title to the said defendants, and gave no authority whatever to these commissioners to issue the said writ of possession, nor the marshal/ of the U. S. to execute it or in any way to disturb your orators in the possession and enjoyment of the same for the following reasons:

First. The act of Congress under which the said sale was made is unconstitutional and void, being repugnant to the Constitution of the U. S. And that it conferred no authority to assess taxes or collect the same or make sales thereunder.

Second. The said tax commissioners made an excessive assessment unauthorized by said act if it were valid, they having levied and collected thirty-five cents on the one hundred dollars independent of the penalty, when by the terms of the actt hey would have been authorized, had the act been valid to levy twenty-seven and three-fourths cents on
178 the hundred dollars in value.

And if it shall be shown that the land herein mentioned was ever assessed it will appear that it, as all other property in and around Memphis which was sold, was assessed at the rate first mentioned.

Your orators charge that said tax commissioners had access to the books of assessment for Shelby County for the year 1860, from which by the said supposed act of Congress for the collection of taxes in the insurrectionary district they were directed to make their assessment.

And so there was no excuse for the excessive levy and assessment of the said taxes.

Third. That said commissioners proceeded to put said act in force and entered upon the discharge of the functions of their office before the time contemplated by or the condition of affairs provided for in said act
179 had occurred, to wit, the military occupation of the U. S. forces of the whole of Shelby County.

Fourth. The said commissioners failed to advertize the sale of property in manner required by the said supposed act, which provides that the commissioners shall cause such sale to be advertized in a newspaper in the town or county where the property is situated.

Your orators charge that the sale of this property was never advertized

at all; and that if any advertizement was made of said land it was not made in any newspaper whatever; that the only advertisement of any sale which took place in the county of Shelby (several newspapers being published at the time in the city of Memphis) was a sheet not attached to any part of any newspaper whatever, and not even circulated with or sent to the subscribers *of* patrons of any newspaper, and of which sheet only a
180 small number of copies, not more than one-fifth of the number that were issued of the newspaper were issued or printed.

That the daily circulation of the Bulletin newspaper was at that time five thousand or upwards, as they are informed and believe; and that not more than one thousand copies of said advertisement were issued or printed. That at the head of said advertisement, printed in small capitals, "Memphis Morning Bulletin supplement," from which orators suppose it is intended that said sheets shall be considered as a supplement to said newspaper, but the provisions of said act require that such advertisement shall be in a newspaper, not in a hand-bill, and that by calling such hand-bill a "supplement" will not make it a thing entirely different from either.

Fifth. Orators allege that although this supplement, even if by
181 any construction of its charter it could be regarded as a newspaper under the act, purports to have been issued on the 14th of May, so as to make four weeks publication previous to the 13th June, the day fixed in the advertisement for the sale; yet, in fact, your orators allege that the first issue ever made of this supplement was made on the 4th June, 1864.

And they are advised that this fact alone would vitiate the entire proceedings and make the sale null and void.

Sixth. They further allege that the land of your orators by said commissioners was not made on the day of June, 1864, the day stated in the advertisement, but on a day subsequent thereto, & for this reason also they insist that the pretended tax title held by the said Ensminger is a cloud upon their title to the land; and they are advised they are entitled
182 to the aid of your honorable court to have said cloud removed.

The premises considered, your orators pray that the said Ensminger, by publication, and Sears, by spa., be made defendants to this bill by proper process; and that they be required to answer the same fully as to all the charges and allegations. And further pray that an injunction issue restraining them and all others concerned from the execution of said writ of possession, now in the hands of the marshall, or procuring the issuance or execution of any other writ for said property, or otherwise molesting or disturbing your orators in the possession and enjoyment of the same until the matter can be enquired into.

And on the hearing of this cause they pray that said injunction be made perpetual & said sale be declared void, and said claim of defendant
183 a cloud upon the title of the City of Memphis, and that the be removed by such decree as may seem right and proper. Such other and further relief as may seem reasonable.

This is the first application for an injunction in this case.

R. J. MORGAN, *Sol.*

184 STATE OF TENNESSEE, SHELBY COUNTY,
*U. S. of America, District of West Tenn.:*

Personally appeared before me, Isaac Morrison, U. S. commissioner for

said district, John C. Powers, agent for Bridget Powers, one of the complainants in the foregoing bill, who, being sworn, saith that the matters and things stated in the bill of his own information is true, and those stated upon the information of others he believes to be true.

JOHN C. POWERS.

Subscribed & sworn to before me this 22nd May, 1867.

ISAAC MORRISON,
*U. S. Com'r.*

185 *Notice.*

MARMADUKE L. ENSMINGER and J. J. SEARS, *Agent:*

Please take notice that on the 29th day of May, 1867, between the hours of 9 a. m. & 5 p. m., at the residence of Hon. C. F. Trigg, at Knoxville, Tenn., I will apply to him for an injunction to restrain you and all others concerned from executing a writ of possession, issued by the United States district tax commissioners of Tennessee, for the following described tract of land lying in Shelby County, Tennessee: Lot ten (10), Chickasaw st., $55\frac{7}{100}$ by 190 feet, assessed to G. McLean, in 1860, fifth district, city of Memphis, or procuring the issuance or execution of any other writ for said property, or otherwise molesting or disturbing me in the enjoyment of the same, where and when you can resist said application, if you see proper.

Memphis, Tenn., May 22d, 1867.

R. J. MORGAN,
*Sol. for the City of Memphis.*

186 J. W. Griffith is hereby appointed special deputy U. S. marshal, district of West Tennessee, to execute and return the within notice.

Given under my hand and seal this 22' day of May, 1867.

J. M. TOMENY, [SEAL.]
*Marshal, C.*

This notice came into my hands on the 22d day of May, 1867, and I served the same on the same day by making known the contents of the same to J. J. Sears, esq., agent of Marmaduke L. Ensminger, and I also delivered to him a copy of this notice. Marmaduke L. Ensminger not found in my bailiwick.

This 22nd day of May, 1867.

J. M. TOMENEY,
*U. S. Marshal for the Dist. of West Tenn.,*
By J. W. GRIFFITH, *Deputy.*

187 To the clerk of the United States circuit court for the district of west Tennessee:

Let writs of spa. & injunction issue according to the prayer of the within bill, upon the complainants entering into bond with good security in the penalty of three thousand dollars, conditioned according to law.

CONNALLY F. TRIGG,
*U. S. District Judge, &c.*

KNOXVILLE, *May 29th*, 1867.

188 The President of the United States to the marshal of the district of West Tennessee, greeting:

You are hereby commanded to summon Marmaduke L. Ensminger and J. J. Sears, citizens of the State of Tennessee, if they are to be found within your district, to appear before the judge of the circuit court of the United States, in the sixth circuit for the district of West Tennessee at Memphis, on the first Monday in September next, and then and there to answer, plead, or demur to the bill of complaint of the Mayor & Aldermen of the City of Memphis and Bridget Powers, filed against them in said court, and to do further and receive what said court shall order and decree in the premises.

Herein fail not, and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this first Monday in March, in the year 1867, & of the Independence of the United States, the ninety

189 A. S. MITCHELL, *Clerk.*
ISAAC MORRISON,
*Dep. Clk.*

Know all men by these presents that we, W. O. Lofland & , held and firmly bound unto Marmaduke L. Ensminger and J. J. Sears, in the sum of two hundred and fifty dollars, to be void on condition that Mayor & Aldermen of the City of Memphis & Bridget Powers do pay and satisfy all costs that may accrue in that behalf in the prosecution of a suit this day commenced by them (in equity) in the circuit court of the United States, for the district of West Tennessee, at Memphis, against said Ensminger & Sears, on failure of the plaintiffs to prosecute their said suit with effect, and also on failure of the defendants, if convicted, to pay said costs; and we agree that judgment on motion without notice may be rendered against us for the same.

190 Witness hands and seals this 7th day of June, 1867.

[SEAL.]
L. R. RICHARDS. [SEAL.]

Come to hand June 10th, 1867. Executed same day by reading to J. J. Sears, esqr., and I also delivered him a copy of this summons, and I executed the within on Marmaduke Ensminger by reading to J. J. Sears, esqr., agent of said Ensminger, and I also left with him a copy of this summons this 10th day of June, 1867.

J. M. TOMENY,
*U. S. Marshal, W. T.*
By J. W. GRIFFITH,
*Special Deputy.*

(Endorsed:) No. 89. M. & A. of Memphis et al. vs. M. L. Ensminger & J. J. Sears. Summons. Issued 10th day of June, 1867. A. S. Mitchell, clerk. Isaac Morrison, D. C.

191 J. W. Griffith is hereby appointed special deputy U. S. marshal/ district of West Tennessee, to execute and return the within summons.

Given under my hand and seal this 10th day of June, 1867.

J. M. TOMENY. [SEAL.]
*Marshal.*

UNITED STATES OF AMERICA,
*District of West Tennessee:*

We, the Mayor & Aldermen of the City of Memphis and W. O. Lofland, Lewis Richards, acknowledge ourselves indebted to Marmaduke L. Ensminger & J. J. Sears in the sum of three thousand ($3,000) dollars.

The condition of this obligation is such that whereas the said Mayor & Aldermen of the City of Memphis and Bridget Powers have filed their bill of complaint in the United States circuit court for the district afore-
192 said, against the said Marmaduke L. Ensminger & J. J. Sears, and have obtained an injunction therein:

Now, if the said Mayor and Aldermen of the City of Memphis and Bridget Powers shall pay all costs and damages that may be recovered against them in consequence of the suing out of said injunction, and shall abide by and perform the order, sentence, or decree of said court in said cause, then this obligation to be void; otherwise to remain in full force and effect.

Witness our hands and seals this 7th day of June, 1867.

MAYOR & ALDERMEN OF THE CITY OF MEMPHIS.
By W. O. LOFLAND, *Mayor*. [SEAL.]
W. O. LOFLAND. [SEAL.]
[L. S.] L. R. RICHARDS. [SEAL.]

(Endorsement:) No. 89. Circuit court of the United States, district of West Tennessee. M. & A. of Memphis vs. M. L. Ensminger &
193 J. J. Sears. Injunction bond. Filed 10th day of June, 1867. A. S. Michell, clerk; Isaac Morrison, d. c.

The President of the United States of America to the marshal of the district of West Tennessee, greeting:

Witness the Mayor & Aldermen of the City of Memphis and Bridget Powers have filed their bill of complaint in the circuit court of the United States for the district aforesaid against Marmaduke L. Ensminger & J. J. Sears, praying, among other things, that said defendants be enjoined from executing a writ of possession issued by the United States direct tax commissioners for the district of Tennessee for the following property, to wit: Lot No. (10) ten on the map of the navy-yard property lying between the Mississippi and Wolf Rivers, in the city of Memphis, county of Shelby, and State of Tennessee, and from in any way disturbing complain-
194 ant in their possession of said property until the further order of said court, and ha' obtained the fiat of the Hon. Connally F. Trigg, United States district judge, directing injunction to issue according to the prayer of said bill.

You will therefore notify said Marmaduke L. Ensminger & J. J. Sears at once and entirely to desist from the further execution of said writ of possession and from in any way disturbing complainant in the possession of said property until the further order of the court in the premises, under the pains and penalties prescribed by law. And how you shall have executed this writ, do you make due and legal return at the next term of said court at the Federal court-room in the city of Memphis, on the first Monday in September next.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme

195 Court of the United States, the first Monday in March, 1867, and of our Independence the 91st year.

[L. S.] A. S. MITCHELL, *Clerk.*
ISAAC MORRISON,
*Deputy Clerk*

Came to hand June 10th, 1867; executed same day on Marmaduke Ensminger, by reading to J. J. Sears, esq., agent of said Ensminger, and I also served upon J. J. Sears, esqr., by reading to him, this 10th day of June, 1867.

J. M. TOMENY,
*U. S. Marshal.*
By J. W. GRIFFITH,
*Sp'l Dep.*

(Endorsement:) No. 89. Circuit court of the United States, district of West Tennessee. M. & A. of Memphis et al vs. M. L. Ensminger & J. J. Sears. Injunction. Issued 10th day of June, 1867. A. S. Mitchell, clerk. Isaac Morrison, d. clerk. Came to hand day of , 186 .

196 J. W. Griffith is hereby appointed special deputy U. S. marshal, district of West Tennessee, to execute and return the within injunction.

Given under my hand and seal this 10th day of June, 1867.

J. M. TOMENY, [SEAL.
*Marshal.*

In the circuit court of the United States for the district of West Tenn.

THE BOARD OF MAYOR AND ALDERMEN OF Memphis and Bridget Powers
*vs.*
MARMADUKE L. ENSMINGER.

The defendant, Marmaduke L. Ensminger, saving & reserving, &c., for answer to the foregoing bill, says:

It may be true, as stated, that the Board of Mayor and Aldermen had the title to the land in question, and may have made the lease to the complainant Powers, as is alleged, but defendant is ignorant whether the facts be so or not, and he asks that complainants may be held to

197 strict proof in the premises. Defendant further saith that at a public sale duly and properly held in the city of Memphis, on the twenty-fourth of June, 1864, by E. P. Ferry, John B. Rodgers, and Delano T. Smith, commissioners of the United States for the collection of direct taxes, under and by virtue of an act of Congress passed 7th June, 1862, entitled "An act for the collection of direct taxes in the insurrectionary districts within the United States, and for other purposes," and the act amending the same, the following lot or parcel of land was offered for sale, to wit: Chicasaw street, fifty-five and seven one-hundredths by one hundred and seventy ($55\frac{7}{100}$ x 170) feet, lot ten (10), assessed to G. McLean in 1860, fifth civil district, city of Memphis, and the same was struck off and sold to the defendant, he being the last and highest bidder, in the sum of three hundred and five dollars, and thereupon

198 the said commissioners duly executed to him a certificate of sale, a copy of which he presents as an exhibit to this bill, and the original he is ready to produce when required by the court. And the defendant says that he acquired thereby an absolute fee simple title in the said lot and the right of possession thereto, and he would have caused his writ of possession to have been executed but for the injunction of this court.

Defendant submits that the said sale was valid, the acts of Congress being in no sense repugnant to the Constitution of the U. S. He denies that the tax assessed was excessive, and demands proof, but if the commission were mistaken in the amount he submits that this will not invalidate the sale.

He denies that the commissioners entered on their duties prematurely, since, as he alleges, at the time they so entered the military authority of the United States had been established over more than one county
199 in the State. But if this were otherwise, he submits that the act in this particular was merely directory, and complainant cannot complain.

He denies that the advertisement of the sale was not duly made according to law. He alleges it was so made for four weeks in the supplement of the Memphis Bulletin, a newspaper published in the city of Memphis, and if this were not so, he submits that complainant cannot have advantage of it, as by the not payment of the taxes within sixty days after they were fixed by the commissioners, the land became forfeited to the United States, and complainant is limited to the allegations allowed by the act of Congress.

Defendant submits that complainants have lost and forfeited their right, title, and interest in the said land, and the certificate of sale of defendant is no cloud on any title of theirs.

And d'f't having answered, &c., prays to be dismissed, &c.

McRAE & WALKER,
*Sol's for Def't.*

200 M. L. ENSMINGER,
By J. J. SEARS,
*Att'y in Fact.*

Personally appeared J. J. Sears, and made oath in due form of law that the facts set forth in the foregoing answer are true, according to the best of his knowledge, information, and belief.

A. S. MITCHELL,
*Clerk U. S. Circuit Court.*

DEC. 5TH, 1867.

(Endorsed:) Mayor & Aldermen of Memphis vs. M. L. Ensminger. Answer. McRae & Walker, sol's for resp'd't.

(Copy.)

UNITED STATES OF AMERICA.

*Tax-sale certificate No. 988.*

This is to certify that at a sale of lands for unpaid taxes, under and by virtue of an act entitled "An act for the collection of direct taxes in in-

surrectionary districts within the United States," and for other pur-
201 poses, and the act amending the same, held pursuant to notice, at Memphis, in the county of Shelby, in the State of Tennessee, on the 24th day of June, A. D. 1864, the tract or parcel of land hereinafter described, situate in the county of Shelby and State aforesaid, and described as follows, to wit: Chickasaw street, fifty-five and seven one hundredths by one hundred and seventy ($55\frac{7}{100}$x170) feet, lot ten (10), assessed to G. McLean, in 1860, fifth civil district (city of Memphis), was sold and struck off to Marmaduke L. Ensminger for the sum of three hundred & five dollars and cents, he being the highest bidder, and that being the highest sum bidden for the same, the receipt of which said sum in full is hereby acknowledged and confessed.

Given under our hands at Memphis this twenty-fourth of June, A. D. 1864.

JNO. B. RODGERS,
E. P. TERRY.
DELANO T. SMITH,
*Commissioners.*

202. (Endorsed:) Copy. United States tax sale certificate No. 988. Name of purchaser, Marmaduke L. Ensminger. Date of sale, June 24th, 1864. Amount of sale, $305.

In the circuit court of the United States for the district of West Tenn.
In equity.

THE MAYOR AND ALDERMEN OF THE CITY of Memphis & Bridget Powers
*v.*
MARMADUKE L. ENSMINGER AND J. J. SEARS.

The deposition of J. H. Humphries, a witness of lawful age, taken
203 by consent of parties, on this the 29th day of November, 1870, and to be read in evidence in the hearing of the above cause on behalf of the plaintiffs, subject only to objections for irrelevancy and incompetency.

W. M. RANDOLPH,
*For City of Memphis & Powers.*
McRAE & WALKER.

204 The said J. H. Humphreys, being first duly sworn, deposes as follows:

I am at present, and have been for more than two years past, city engineer of the City of Memphis. I am a practical engineer and surveyor, and am familiar with property in the city of Memphis. I am well acquainted with the location and boundaries of what is known as the "navy-yard" property, being the same that was granted to the city of Memphis by the Congress of the United States, passed on the 3rd day of August, 1854.

I annex to this deposition a map or plat of the said property known as the "navy-yard" property, and make the same Exhibit A. The said map or plat is correct, and the lot in controversy in this suit is repre-

205 sented on it as lot ten (10). It is a part of the said "navy-yard procerty."

J. H. HUMPHREYS.

Subscribed and sworn to before me this 29th day of November, 1870.

ISAAC MORRISON,
*U. S. Com'r.*

(Endorsed:) No. 89. Mayor & Alderman & vs. M. L. Ensmeyer. Deposition of J. H. Humphreys. Filed 29th Nov'r, 1870. Isaac Morrison, d. c.

In the circuit court of the United States for the district of West Tennessee.

In equity.

THE MAYOR AND ALDERMEN OF THE CITY OF Memphis and Bridget Powers
*v.*
M. L. ENSMINGER AND J. J. SEARS.

It is mutually agreed between the parties hereto that all the tes-
206 timony taken on either side in any of the several suits now pending on the equity side of the above-styled court involving the validity of the sales made by the direct tax commissioners of the United States in the city of Memphis, in the year 1864, for non-payment of direct taxes, &c., may be read in evidence in behalf of either party to this cause, as if formally taken herein, subject only to objections for irrelevancy and incompetency.

McRAE & WALKER,
*Att'r's for the City of Memphis.*
JNO. JOHNSON,
*Mayor.*

Attest:
L. R. RICHARDS,
*City Register.*

207 (Endorsed:) Eq. 89. Mayor and Aldermen of Memphis v. M. L. Ensminger & J. J. Sears. Agreement of counsel. Filed 1st December, 1870. Isaac Morrison, d. c.

208 UNITED STATES OF AMERICA,
*Western District of Tennessee:*

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov. term, A. D. 1870, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 1st day of Dec'r, A. D. 1870, in the following cause, to wit:

MAYOR & ALDERMEN OF MEMPHIS & BRIDGET Powers, plaintiff,
*vs.*
M. L. ENSMINGER AND J. J. SEARS, DEFENDANT. } No. 89.

This cause coming on to be heard on the bill, answer, exhibits, the

agreements of counsel, and proofs, and *and* the proofs referred to in the agreements of counsel in the cause, and the same having been fully argued and the court having duly deliberated thereon, it is ordered, adjudged,
and decreed that no sufficient cause is shown by the complainant for
209 the perpetuation of the heretofore granted, and the same is ordered to be dissolved. And it appearing to the' satisfaction that the premises in the pleadings referred to (to wit), Chickasaw street, fifty-five and $\frac{7}{100}$ feet by one hundred and seventy, lot 10, assessed to G. McLean, in 1860, fifth civil district, city of Memphis, was duly sold, at the time specified in the defendants' answer, by the United States direct tax commissioners, John B. Rogers, E. P. Ferry, and Delano T. Smith, under the act of Congress referred to in the pleadings; that at said sale the defendant Marmaduke L. Ensminger, became the last and highest bidder, and the purchaser of said premises, and that he hath acquired a title in fee simple to the same, together with a right *right* of possession therein and that his claim thereto is no cloud upon any title held by complainant,
210 it is further ordered, adjudged, and decreed that the said M. L. Ensminger have a writ of possession, to be issued to the marshal of the United States for this district, to the end that he may be put in peaceable possession of said premises. And it is further decreed that there be a reference to the clerk and master to take an account of the damages suffered by the said defendant by reason of the said injunction, and when ascertained that he report the same to this court, and the bill is retained for this purpose only.

And further, that the complainant pay the costs of this court, for which let execution issue.

And thereupon the plaintiffs pray an appeal from the foregoing decree to the Supreme Court of the United States, and it appearing to the court, and being agreed by the parties that the value of the property in
211 controversy exceeds the sum of two thousand dollars, it is ordered that the said appeal be granted, and that the plaintiffs, within sixty days from this day file with the clerk of this court an appeal bond, conditioned according to law, in the penalty of five hundred dollars, with good and sufficient security to be approved of by the clerk, for the prosecution of the said appeal.

It is further ordered that the bill of exceptions tendered and signed by the court be filed as a part of the record, which is done accordingly.

(Endorsed:) Mayor & Aldermen of Memphis vs. M. L. Ensminger. Final decree. Filed Feb'y 25, 1878. H. E. Andrews, clerk.

212 In the United States court for the district of West Tennessee. In equity.

MAYOR & ALDERMEN OF MEMPHIS
*v.*
M. L. ENSMEYER AND I. I. SEARS. } No. 89.

*Bill of exceptions.*

Be it remembered that on Saturday, the 20th day of December, 1873, being one of the days of the November term of said court, before his honor

Connally F. Trigg, presiding justice, came in to be heard the above-enlisted cause under the following circumstances, to which counsel for the City of Memphis excepted, and prayed a bill of exceptions to, upon the record the facts below, stated as they occurred. First, Duncan K. McRae, esq., of counsel for the , stated that he had been in-
213 structed by his honor H. H. Emmons, lately presiding at this term of the said court, but who had then left the city of Memphis, where said court is held, to enter decrees in the series of causes in said court known as the "United States tax title cases," in all such of these cases as fell within the purview of the decision of his honor, rendered in certain of those cases tried before the said Justice Emmons before that time. And that said decrees were to be entered in those cases which the said counsel thought came within his decision aforesaid. But to be so entered at the peril of said parties, because said justice would, upon a bill of review, set aside said decrees if it appeared to him by such bill of review that the case did not properly fall within his said decision.

214 That he had, at the further suggestion of said justice, published a notice in the city papers, that on Saturday, the 20th December aforesaid, he would proceed to take such decrees, when the counsel interested in the several cases could appear, which said newspaper notice is hereto attached.

Secondly. The said counsel then proceeded to read from a list the cases and to designate such as he desired to enter decrees in and such as he would pass or continue.

When the above-entitled cause was called the counsel for the city objected, and stated that the city attorney would insist that this cause did not come within the class of causes to which Judge Emmons refer'ed, and stated that the city would contend that the property of its munic'-
215 pality was not liable to taxation. That it was exempt under an act of the legislature; that the proof showed the city *warden* 'title' to a decree.

The counsel for the claimants of the tax titles, the said McRae, insisted that he was to be the judge of the cases in which he was entitled to take decrees, and so as to take them at his peril, subject to a bill of *p*review; and that if the city attorney would convince him, before the decrees were entered, that the case was not one proper for a decree, he would not enter it.

The counsel for the city insisted that the presiding judge here present was to determine that question. Whereupon, the presiding judge remarked "That he did not know what Judge Emmons' decision was, nor the scope of it. That he had promised said justice to have entered decrees in
216 such cases as fell within the decision, and that he understood that it was left to counsel for the claimants of the tax titles to determine which were such cases, and that he would enter decrees on such cases as the said counsel should designate with the understanding that such proceedings were at his peril."

Thereupon counsel for the city enquired if Judge Emmons' de-
217 cree or decision, or the order under which these proceedings were had were of record.

And the counsel for the tax-title claimants informed the court that such order was not of record, but that it would be entered of record before the

decrees were entered. And thereupon B. M. Estes, esq'r, who was of counsel and argued the cases in opposition to the tax titles, stated to the court: That Judge Emmons' written opinion had been lost or mislaid, having been rendered some time ago & then withdrawn for revision, since which time it could not be found.

That in it he had only decided that the acts of Congress under which the sales were made were constitutional, and the proceeding of the commissioners thereupon regular.

That prior to the final determination of the case by the judge,
218 and while he had it under advisement, the case had been compromised, and hence no decree had ever been entered.

Counsel for the city then objected to a decree in this case, because it involved other objections than the constitutionality of the acts of Congress and the regularity of the proceedings of the commissioners appointed under them, and asked to have those other questions argued.

Whereupon counsel for the tax-title claimants insisted that if the case contained other questions the city could show it on bill of review and the decree would be set aside under Judge Emmons' order, to which counsel for the city objected that a bill of review would not lie, and insisted on determination of the question by the court whether this case came within Judge Emmons' order for the entry of decrees.

219 And thereupon the court decided that the counsel for the claimant should enter decrees in such cases as he designated, as under the undertaking with his brother Emmons he had only to direct such decrees to be entered as the counsel should determine. To all of which counsel for the city excepted, and prayed that by bill of exceptions the city should be allowed to show the proceedings in court as they occur'ed and its exceptions thereto.

And now accordingly the said city here tenders this bill of exceptions, and objected to the said decree and all said proceedings as here'fore on the hearing they were objected to, and prays that said bill of exceptions may be signed and sealed by the judge presiding and made a part of the record, which is done accordingly.

CONNALLY F. TRIGG, *Judge*. [SEAL.]

220 (Endorsed:) Equity. No. 89. M. & A. Memphis v. M. L. Ensmeyer & I. I. Sears. Bill exceptions. Filed Dec. 27, 1873. H. E. Andrews, clerk.

221 [Record, page 524.]

SATURDAY, *December 27th*, 1873.

Court met; present, Hon. Connolly F. Trigg, judge.

MAYOR & ALDERMEN OF MEMPHIS & BRIDGET Powers
vs.
MARMADUKE E. ENSMEYER & J. J. SEARS. } 89.

This cause coming on to be heard upon the bill, answer, exhibits, the agreement of counsel, and proof in the cause, and the proof refer'ed to in

the agreement of counsel, and the same having been fully argued, and the court having duly deliberated thereon, it is ordered, adjudged, and decreed that no sufficient cause is shown by the complainant for the perpetuation of the injunction heretofore granted, and the same is ordered to be dissolved. And it appearing to the satisfaction of the court that the premises in the pleadings refer'ed to, to wit, on Chickasaw street,
222 55 & $\frac{7}{100}$ feet by one hundred and seventy, being lot 10, assessed to G. McLane in 1860, fifth civil district, city of Memphis, was duly sold at the time specified in the defendants' answer by the United States direct tax commissioners, John B. Rodgers, E. P. Young, & Delano T. Smith, under the acts of Congress refer'ed to in the pleadings, and it further appearing that at said sale the defendant, Marmaduke E. Ensmeyer, became the last and highest bidder and the purchaser of said premises, and that he hath thereby acquired a title in fee-simple to the same, together with a right of possession therein, and that his claim thereto is no cloud upon any title held by the complainant, it is further adjudged and decreed that the said M. E. Ensmeyer have a writ of possession, to
223 be issued to the marshal of the United States for this district, to the end that he may be put into peaceable possession of said premises. And it is further decreed that there be a reference to the cle'k and master to take an account of the damages suffered by the said defendant by reason of the said injunction, and when ascertained that he report the same to this court, and the bill is retained for this cause only. And it is further decreed that the complainant pay the costs of this court, for which let execution issue, and therefore the plaintiff" pray an appeal from the foregoing decree to the Supreme Court of the United States; and it appearing to the court and being agreed by the parties that the value of the property in controversy exceeds the sum of two thousand dollars, it is
224 ordered that said appeal be granted, and that the plaintiff" within sixty days from this day file with the clerk of this court an appeal bond, conditioned according to law, in the penalty of five thousand dollars, with good and sufficient security, to be approved of by the clerk, for the prosecution of the said appeal. It is furthe*r*l ordered that the bill of exceptions tendered and signed by the court be filed as a part of the record, which is done accordingly.

Supreme Court of the United States.

Know all men by these present' that we, The Mayor and Aldermen and Bridget Powers, as prencipals, and John C. Powers as surety, are held and firmly bound unto M. L. Ensminger and I. I. Sears, in the sum of five hundred dollars, to be paid to the said M. L. Ensminger and
225 I. I. Sears, their executors and administrators, to which payments, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this seventh day of January, 1874.

Whereas the above-named Mayor and Aldermen of Memphis and Bridget Powers have taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the suit of The Mayor & Aldermen of Memphis and Bridget Powers against said M. L. Ensminger and I. I.

Sears by the circuit court court of the United States for the district of West Tennessee:

Now, therefore, the condition of this obligation is such that if
226 the above-named appellants shall prosecute said appeal to effect, and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

MAYOR & ALDERMEN OF MEMPHIS, and
BRIDGET POWERS,
By W. M. RANDOLPH, *Att'y.*
JOHN C. POWERS, *Surety.* [SEAL.]

227 Circuit court of the United States, western district of Tennessee.
No. 89. Equity.

MAYOR & ALDERMEN OF THE CITY OF MEMPHIS et al.
*vs.*
MARMADUKE ENSMEYER & J. J. SEARS. } Equity.

*Notice.*

To Marmaduke Ensmeyer and J. J. Sears, defendants herein:

You will please take notice that in accordance with an order of reference, decreed in our said court on the 27th day of December, A. D. 1873, to the clerk and master, to take an account of the damages suffered by the defendant by reason of the injunction herein, I will be at my office on Thursday next, at 10 o'clock a. m., A. D. 1876, February 24th, and will take the testimony of such persons as may be produced before me, as to the matter to me referred.

Witness my hand and the seal of said court this 22d day of February, 1876.

[L. S.] H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

228 (Endorsed:) No. 89. Circuit court of the United States, western district of Tennessee. City of Memphis et al. vs. Ensmeyer & Sears. Notice.

Executed this writ by making known the contents hereof to the within-named J. J. Sears, on 22d February, 1876. The within-named Marmaduke Ensmeyer not found in my district.

L. B. EATON,
*U. S. Marshal.*

Serv., 2.00; 2 m., 12.—$2.12.

Ret'd & filed Feb. 23, 1876. H. E. Andrews, clerk; L. H. Pillsbury, d. c.

Circuit court of the United States, western district of Tennessee.

MAYOR AND ALDERMEN OF THE CITY OF MEMPHIS et al.
*vs.*
MARMADUKE ENSMEYER AND J. J. SEARS. } No. 89. Equity.

*Notice.*

229 To S. P. Walker, city attorney, and to Marmaduke Ensmeyer and J. J. Sears, defendants herein:

You will please take notice that in accordance with an order of reference, decreed in our said court on the 27th day of December, A. D. 1873, to the clerk and master, to take an account of the damages suffered by the defendant by reason of the injunction herein, I will be at my office on Thursday next, at ten o'clock a. m., A. D. 1876, February 24th, and will take the testimony of such persons as may be produced before me, as to the matters to me referred.

Witness my hand and the seal of said court this 22d day of February, 1876.

[L. S.] H. E. ANDREWS, *Clerk*,
L. H. PILLSBURY, *D. C.*

(Endorsed:) No. 89. Circuit court of the United States, western district of Tennessee. City of Memphis et al. vs. Ensmeyer and Sears. Notice.

Executed this writ by making known the contents hereof to the
230 within-named J. J. Sears and S. P. Walker, each on 22d day February, 1876. The within-named Marmaduke Ensmeyer not found in my district.

L. B. EATON,
*U. S. Marshal.*

2 serv., 4.00; 3 m., 18—4.18.

Ret'd & filed Feb. 23, 1876. H. E. Andrews, clerk; L. H. Pillsbury, d. c.

231 UNITED STATES OF AMERICA,
*Western District of Tennessee:*

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its May term, A. D. 1876, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 19th day of June, A. D. 1876, in the following cause, to wit:

MAYOR AND ALDERMEN OF CITY OF MEMPHIS, plaintiff,
*vs.*
ENSMINGER AND J. J. SEARS, DEFENDANT. } No. 89.

Upon motion of defendants this day made in open court, it appearing

that in this cause, to wit, on the 23d day of December, 1873, a decree was had in favor of defendants, and an order of reference made to the clerk and master to report the amount of damages sustained by the defendants by reason of the injunction awarded him, and it further appearing
232 that the complainant appealed from said decree to the Supreme Court of the United States, which said appeal, as appears by the procedendo herein filed, has been dismissed, and the cause allowed to proceed in this court: It is therefore ordered by the court, upon motion of defendants, that the order of reference heretofore made be, and the same is hereby, renewed, and the clerk of this court is ordered to take and state an account as to the amount of damages sustained by said defendants by reason of the injunction issued in this cause, and he will further report what damages have been sustained by said defendant by reason of the loss of rents and profits of the land described in the pleadings. All of which is in pursuance of said mandate of the said Supreme Court of the United States, filed herein June 17th, A. D. 1876, which mandate is in the words and figures, to wit:

233 UNITED STATES OF AMERICA:

The President of the United States *to* America to the honorable the judges of the circuit court of the United States for the western district of Tennessee, greeting:

Whereas lately, in the circuit court of the United States for the western district of Tennessee, before you, or some of you, in a cause between the Mayor & Aldermen of the City of Memphis, and Bridget Powers, complainants, and Marmaduke E. Ensminger and J. J. Sears, defendants, wherein the decree of said circuit court, entered in said cause, on the 27th day of December, A. D. 1873, was in favor of the said defendants Marmaduke E. Ensminger and J. J. Sears, and against the said complainants; whereupon the said complainants prayed an appeal to the Supreme
234 Court of the United States, as by the inspection of the certificate of the said circuit court, under the seal of said circuit court, which was brought into the Supreme Court of the United States, agreeably to the act of Congress and the rules of the said Supreme Court in such case made and provided, fully and at large appears.

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and seventy-five, the said cause came on to be heard before the said Supreme Court; it appearing that the said appellants have failed to have their said cause filed and docketed in conformity with the rules of this court, it is now here ordered, adjudged, and decreed by this court, that this appeal from the circuit court of the United States for the western district of Tennessee be, and the same is hereby, docketed and dismissed with costs, and that the said defendants Marmaduke
235 E. Ensminger and J. J. Sears recover against the said complainants, thirty-three dollars and twelve cents, for their costs herein expended, and have execution therefore.

And it is further ordered that this cause be, and the same hereby is, remanded to the said circuit court.

13th December, 1875.

You, therefore, are commanded that such execution and proceedings be

had in said cause, as according to right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the honorable Morrison R. Waite, Chief Justice of said Supreme Court, the twenty-seventh day in the year of our Lord one thousand eight hundred and seventy-six.

Costs of defendants: Clerk, $13.12; attorney, $20.00—$33.12. Taxed by—

D. W. MIDDLETON,
*Clerk of the Supreme Court of the United States.*

236 (Endorsed:) Circuit court of the United States, western district of Tennessee. Mayor, &c., of Memphis vs. Ensminger & Sears. No. 228. Equity. Mandate of Supreme Court of the United States. No. 871. October term, 1875. Filed June 17, 1876. H. E. Andrews, clerk; L. H. Pillsbury, d. c.

237 UNITED STATES OF AMERICA,
*Western District of Tennessee:*

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its May term, A. D. 18'6, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 20 day of June, A. D. 1876, in the following cause, to wit:

CITY OF MEMPHIS ET AL., PLAINTIFF,
*vs.*
ENSMEYER & J. J. SEARS, DEFENDANT. } No. 89.

Upon motion of defendant this day made in open court, from good and sufficient reasons appearing to the court, it is ordered that an alias writ of possession issue in this cause to the marshal of the western district of Tennessee, commanding him to place the defendant M. E. Ensmeyer into possession of the premises described in the pleadings and awarded to the defendants by a decree theretofore entered in this cause.

238 Circuit court of the United States for district of West. Tenn.

CITY OF MEMPHIS
*vs.*
ENSMEYER & SEARS. } 89. Equity.

To the marshal of the circuit of the United States for the western district of Tennessee:

Whereas it appearing from the record and proceedings in this cause that on the 27th of December, 1873, it was decreed by this court that the clerk of this court should issue its process commanding you to put the said M. E. Ensminger into the possession of the following real estate lying and being in the county of Shelby and State of Tennessee, and described as follows: On Chickasaw street, $55_{\text{I}}{}^{7}{}_{\bar{0}}$ feet by one hundred and seventy,

lot 10, assessed to G. McLane in 1860; and whereas it appears that said writ of possession was not executed, but held up by consent of parties, and that the decree heretofore made in this cause was appealed from
239 by the defendants, which said appeal was dismissed by the Supreme Court of the United States, and the cause allowed to proceed under the decree of the court below, all of which appears from the mandate of the Supreme Court filed herein; and whereas the defendants have applied for an alias writ of possession for the said land described in the former writ referred to: Now, therefore, you are hereby commanded that without delay, and by virtue of the authority of said decree in this cause made, and of this writ, you put the said defendant M. E. Ensminger into the possession of said above-described premises, removing therefrom all such persons as may be thereupon, disputing or resisting such possession, and you are hereby commanded, by authority aforesaid, to render to said defendant all the assistance in your power, or which he may require, in order to obtain peaceable possession of the said premises. And herein fail not, and have you then and there this writ.

240 Witness the Hon. M. R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Memphis, this the 8th day of July, 1876.

[L. S.] H. E. ANDREWS, *Clerk.*

(Endorsed:) No. 89. Equity. Circuit court of the United States, western district of Tennessee. City of Memphis vs. Ensminger & Sears.

MEMPHIS, TENN., *July* 19, 1877.

On said date I accompanied J. J. Sears in and about the within-named premises, notified all tenants to vacate said premises, and put said J. J. Sears in quiet and peaceable possession.

L. B. EATON,
*U. S. Marshal,*
By W. KOCH, *Dep.*

Fees, 2.70.

MEMPHIS, TENN., *July* , 1876.

Rec'd from L. B. Eaton, U. S. marshal, per Wm. Koch, deputy, full, complete, and peaceable possession of the within-described premises.

Ret'd & filed Feb. 13, 1877. H. E. Andrews, clerk, by L. H. Pillsbury, d. c.

241 Circuit court of the United States, western district of Tennessee.

ENSMEYER & SEARS
*v.*
CITY OF MEMPHIS. } No. 89. On reference to clerk.

Notice is hereby given that I will proceed, on Saturday next, July 29, at 10 o'clock a. m., to take such testimony as may be produced before me,

at the U. S. court-room, in the city of Memphis, in the matter of reference in the said cause.

Memphis, July 27, 1876.

Respectfully,

H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

(Indorsed:) No. 89. Circuit court of the United States, western district of Tennessee. Ensmeyer & Sears vs. City of Memphis. Notice to take testimony. Ret'd & filed Aug. 25, 1876. H. E. Andrews, clerk.

242 Circuit court of the United States, western district of Tennessee.

ENSMEYER & SEARS
*vs.*
CITY OF MEMPHIS. } No. 89. On reference to clerk.

Mess. ESTES & ELLETT:

Notice is hereby given that I will, in accordance with the order of reference heretofore made in this cause, proceed to take the testimony produced before me, at the U. S. court-room, on the 29th day of July, 1876, at 10 a. m.

Memphis, Tenn., July 27, 1876.

Respectfully,

H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

(Endorsed:) No. 89. Circuit court of the United States, western district of Tennessee. Ensmeyer & Sneed v. City of Memphis. Notice to take testimony.

We are not sol's in this case.

ESTES & ELLETT.

On the 27th July, 1876, I made known the contents hereof, by reading same to Mess. Estes & Ellett, at Memphis, Tenn.

L. B. EATON,
*U. S. Marshal.*
K.

Serv., 4.00; 2 m., 0.12—4.12.

Ret'd & filed Aug. 25, 1876. H. E. Andrews, clerk.

243 Circuit court of the United States, western district of Tennessee.

ENSMEYER & SEARS
*vs.*
CITY OF MEMPHIS. } No. 89. Equity docket. On reference to clerk.

S. W. Walker, esq.:

Notice is hereby given that on Saturday next, the U. S. court-room,

at 10 o'clock a. m., I will proceed to take the testimony to be used upon the trial of the above cause as to the matters referred.

Respectfully,

H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

MEMPHIS, *July 27th*, 1876.

(Endorsed:) No. 89. Circuit court of the United States, western district of Tennessee. Ensmeyer & Sears vs. City of Memphis. Notice to take depositions.

On the 27 day July, 1876, I made known the contents hereof by reading same to S. P. Walker, at Memphis, Tenn.

L. B. EATON,
*U. S. Marshal,*
By K.

Serv., 2.00; 1 m., 0.06—2.06.

Ret'd & filed Aug. 25, 1876. H. E. Andrews, clerk.

244 *Notice to take depositions.*

Circuit court of the United States, western district of Tennessee.

ENSMEYER AND SEARS
*vs*
CITY OF MEMPHIS.

S. P. Walker, solicitor for defendant:

You are hereby notified that on Wednesday, October 18th, 1876, I will, at my office, at 10 o'clock a. m., proceed to complete the taking of testimony under the order of reference in the above cause.

Witness my hand and seal of court this Oct. 14th, 1876.

[L. S.]

H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

(Endorsed:) No. 89. Circuit court of the United States, western district of Tennessee. Ensmeyer et al. v. City of Memphis. Notice.

MEMPHIS, TENN., *Octo. 16th*, 1876.

On said 16th Octo., 1876, I served true copy hereof, personally, on S. P. Walker, as solicitor for defendant herein.

L. B. EATON,
*U. S. Marshal,*
By A. J. GARDNER, *Dep.*

Serv., 2.00; copy, 0.50; 1 m., 0.06—$2.56.

Ret'd & filed Oct., 1876. H. E. Andrews, clerk; L. H. Pillsbury, d. c.

245 *Notice to take depositions.*

Circuit court of the United States, western district of Tennessee.

ENSMEYER & SEARS
*vs.*
CITY OF MEMPHIS. } No. 89. Eq.

Messrs. Myers & Sneed, sol's for complainants:

You are hereby notified that on Wednesday next, October 18th, 1876, I will, at my office, at 10 o'clock a. m., proceed to complete the taking of testimony under the order of reference in the above cause.

Witness my hand & seal of court this Oct. 14th, 1876.

[L. S.] H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

(Endorsed:) No. 89. Circuit court of the United States, western district of Tennessee. Ensmeyer et al. vs. City of Memphis. Notice.

MEMPHIS, TENN., *Octo. 16th*, 1876.

On said Octo. 16, 1876, I served true copy hereof personally on D. E. Meyers, of firm of Myers & Sneed, solicitors for complainants herein.

L. B. EATON,
*U. S. Marshal,*
By A. J. GARDNER, *Dep.*

1 serv., 2.00; one cop., 0.50; one m., 0.06—$2.56.

Ret'd & filed Oct. , 1876. H. E. Andrews, clerk; L. H. Pillsbury, d. c.

246 United States circuit court, western district of Tennessee.

MAYOR, &C., OF MEMPHIS
*vs.*
ENSMEYER & SEARS. } 89. Equity.

Deposition of Hugh Nott, taken on part of defendant, to be used as evidence in this cause, on notice herein given, before the clerk of the United States circuit court for district of West Tennessee, at the office of the clerk of the said court, in the city of Memphis, on the 29th day of July, 1876, commencing at 11 o'clock a. m.

Ques. 1. What is your name, age, business, and occupation, and are you acquainted with the real estate described in this cause, and its rental value from June, 1867, to July, 1876?

Ans. Hugh Nott; age, forty-one; live in Memphis; revenue officer. I am acquainted with the property described in this cause; have lived on the lot adjoining this, and owned the property I live in since 1867.

Ques. 2. What is the rental value of said lot 10 from June, 1867, to July, 1876?

247 Ans. I would say the property was worth, from June, 1867, to January, 1869, one hundred dollars per month; from January, 1869, to January, 1870, eighty dollars per month; from January, 1870, to January, 1871, seventy dollars per month; from January, 1871, to Jan-

uary, 1873, sixty-five dollars per month, and from 1873 to the present time, fifty dollars per month. This, I say, was the fair value of the property during said years, and what I think it was reasonably worth.

Ques. 3. Are you acquainted with the rental value of the east end of lot 10, formerly occupied by McMahon, from June, 1867, to July, 1876?

Ans. I would say that the house & lot on that end of lot 10, as described, was worth, during years 1868 and 1869, forty dollars per month; 1870, 1871, 1872, & 1873, thirty dollars per month, and from January, 1874, to the present time I would say it was worth at least fifteen dollars per month, if not more.

248 Ques. 4. What means of knowledge have you as to the rental value of property from June, 1867, to the present time in the city of Memphis?

Ans. I think I am a good judge of the rental value of property during said time. I rented property of my own, and am now renting my own property in the city. And further this deponent saith not.

HUGH NOTT.

Subscribed & sworn to before me.

H. E. ANDREWS, *Clerk.*

Cross-examination of Hugh Nott.

1. X-ques. In what year did Mrs. Powers build her house on lot No. 10, fronting on Promenade street?

Ans. In 1866.

2. X-ques. Please state what this house of Mrs. Powers cost to build it in 1866.

Ans. At that time building was very high, and I should say that that house cost, completed, at that time, about $4,000.

3. X-ques. About what has it been worth during the past two years?

Ans. About 2,500$.

249 4. X-ques. Have not the rental values of property in that part of the city greatly depreciated since 1873?

Ans. Yes, sir.

5. X-ques. By what criterion have you fixed the rental value of this property in your direct examination?

Ans. A portion of the time it was rented to government for officers' quarters. This was from June, 1867, to January, 1869. I rented to the government myself some property adjoining. I heard Mr. Powers state what rent he got.

6. X-ques. What improvements were on this lot No. 10, in 1864, and before Mrs. Powers and Mr. McMahon built on it?

Ans. None. The lot was vacant.

7. X-ques. Has it not been exceedingly difficult to rent property in that part of the city since 1873?

Ans. Yes, sir; very difficult.

8. X-ques. Has not a great proportion of the property in that neighborhood been vacant since 1873?

Ans. Yes.

Re-examined by defendants:

Ques. 1st. Please state whether you had property of your own in the

portion of the city in which this is situated, and rented the same
250 during the year mentioned, from 1867; and if so, how does the rental value placed by you on this property compare with your property and other of equal value in said neighborhood during said time?

Ans. I think the statement of rent mentioned in my examination-in-chief is a very fair rent. I know they received the rent stated in the examination-in-chief from the government from 1867 and 1869. A part of the other time it may have been vacant, but was worth, I think, the value above stated.

Ques. 2. You state, in your cross-examination, that property in that part of the city was very low since 1873. Please state if in the valuation given by you of this property, you took into consideration value of said property during said time, its depreciation and difficulty in renting the same on account of want of demand, &c.

Ans. I considered all of these difficulties and depreciations and also
251 the effect of the yellow fever; which we had just passed through.

Re-X ques. Had not real estate and values generally depreciated to a large extent, even before 1873?

Ans. Yes, sir; but more so in that particular locality north of Poplar street after that time. A hospital had been established then on Promenade st., for yellow-fever patients. And further saith not.

HUGH NOTT.

Subscribed & sworn to before me this October 31st, 1876.

H. E. ANDREWS, *Clerk.*
LEONARD H. PILLSBURY,
*Deputy, & U. S. Com'r W. D. of T.*

(Endorsed:) 89. Eq. Mayor & Aldermen of City of Memphis vs. M. L. Ensminger et al. Deposition of Hugh Nott. Filed Oct. 31st, 1876. H. E. Andrews, clerk; L. H. Pillsbury, d. c.

252 United States circuit court, western district of Tennessee.

MAYOR AND ALDERMEN OF MEMPHIS
*vs.*
ENSMINGER & SEARS. } 89. Equity.

The deposition of EDGAR MCDAVITT, taken on the part of the complainant, to be used in evidence in the above-stated cause, by agreement of counsel, at the office of Estes & Ellet, No. 15 Madison street, Memphis, Tenn., on the 16th day of November, 1876.

Quest. 1. (by complainants' counsel). State your name, age, and residence, and whether you know the position of lot, No. 10 navy-yard grounds, city of Memphis, and its rental value from June, 1867, to July, 1876, and what were your opportunities for so knowing.

Ans. My name is Edgar McDavitt; I am 70 years of age; I have been a resident of Memphis from the year 1844 to this time; I know the position of lot No. 10 of the navy-yard grounds in Memphis;
253 I was appointed receiver of the navy-yard property in the year 1869, by the chancellor of the 1st chancery court of Shelby County,

and as such had charge of said property, and am acquainted with its rental value since that time.

Quest. 2. (by same). Please state what you know as to said lot 10, and its rental value from 1869 to July, 1876?

Ans. Lot 10 was claimed by Bridget Powers, under a lease from the city of Memphis at, I think, $112.50 per year ground rent, and she attorned to me promptly until last fall (fall of 1875). She declined to pay rent in December last. There is a double frame tenement on the west end of the lot fronting on Promenade street. From 1869 to, say, 1873, I suppose those tenements might have been rented at from $25 to $40 per month, I mean for each tenement: I judge by what I received for like property. There was a general decrease in rental values in 1874. From that time (1874) on, I do not suppose the tenements were worth
254 more than $15 per month; I offered the commandant's house for $20, and could not get a tenant.

(Defendants object to said latter part of above answer.)

On the eastern part of said lot there is a house built by a tenant of their own, and I had nothing to do with it, a brick house and kind of saloon, I cannot state what its rental value was worth.

Ques. 3. Do you know what property near said lot 10 (east end) rented for, from 1869 to 1876; if so, state what it rented at?

(Defendants object to above question as irrelevant.)

Ans. I rented out lot 11 from some time in 1873 for about $20 per month, but failed to get the money; it was a larger building than the one on east end of lot 10. It was exceedingly difficult to get rents for property along there in 1873, and as long as I acted as receiver, which was up to January, 1876.

Ques. 4. State the size and character of the commandant's house, referred to by you above, and its position as a valuable house in relation to others in its neighborhood.

255 Ans. It is a very large house. It used to be considered the finest house in the southern country, and has some twenty-odd rooms, I believe.

Ques. 5. Being an old resident of Memphis, state whether you are acquainted with general rental values in the city, and if so, what you think said parts of said lot 10 were worth, rental value, from 1865 to 1869?

Ans. I do not know much about rents in that locality. I was renting better property on Vance st., at $60 per month. It ought to have been higher there than up in the navy-yard. The old lease on the commandant's house was for $1,000 per year; that was the lease made by the city. I collected the back rents. The city paid the taxes as by terms of the lease. The lease was forfeited, and I took possession as receiver, before stated.

(This part of witness's answers relating to the rent of the commandant's house, and his property on Vance st., objected to as irrelevant by defendants.)

256 Defendants objecting to all of the questions and answers in-chief that are irrelevant, proceeds to cross-examine, as follows:

Ques. 1. Please state if *not* the commandant's house referred to in your examination-in-chief was not under a long lease from the city of Mem-

phis at $1,000 per year, and give, if you can, the date of commencement and termination of the same.

Ans. This lease was for the term of twenty-eight years; it was one of the original leases of the city of Memphis, made, I think, in 1850 or 1851, and had twenty-eight years to run.

Ques. 2. Did you ever have anything to do with the rental of lot 10 referred to in your examination-in-chief, other than collecting the ground rent of $112.50 due city as stated in-chief?

Ans. I never did.

Ques. 3. Was not the rental value of property in the city of Memphis very high from 1865 to about 1869?

Ans. Yes, sir; it was high.

257 Ques. 4. Are there any taxes due on lot 10 at this time; if so, how much and to whom are the same due, and who were to pay the same under the lease of the city?

Ans. The best of my recollection there is about twelve hundred dollars due on lot 10; it is now due to the bondholders according to my notion of law. The terms of the lease were that the lessees had to pay all taxes and assessments; this was the case with all the leases made by the city, except the one to the commandant's house; this tax is assessment made for the State and county. This tax was paid by me under an order of the chancery court, but the same order held the tenants and owners liable for said tax, and it now stands against them.

Ques. 5. Did you ever make a critical examination of the houses on lot 10, or were you ever inside of the buildings therein?

258 Ans. I was never inside of the brick house on the east side of lot 10. I have been in the Powers' house once or twice, but made no examination. And further saith not.

E. McDAVITT.

Oath and formalities waived.

ESTES & ELLETT,
*For Complainant.*

Also the deposition of R. A. Parker, taken at the time and place as last above mentioned by same parties.

Ques. State what you know as to lot 10, navy-yard, Memphis, called the Powers lot, and whether you know its rental value from 1867 to 1876; state all you know about it, your opinion, and the reasons on which it is based.

Ans. As clerk for E. McDavitt, receiver, I collected ground rents on the lot from 1869 to 1874, (in the spring) about $112.00 per year. The lot lays well, has a double tenement frame two-story building fronting Promenade st., worth, I think, an average of $200 to $250 each per

259 year from 1869 to this time. There are other improvements on the lot fronting Front st., but I *but I* have never examined them and know nothing of their value, and cannot testify as to their rental value.

Cross-examined by defendant:

Ques. 1. Were you ever in either of said houses, and did you ever make an examination as to their conditions and internal arrangements?

Ans. I went to the door one day; did not go in or make any examination.

Ques. 2. Have you much experience in renting property or its value in this portion of the city?

Ans. Not much. I had occasion to talk with various lessees up there as to the renting of their property. I formed my opinion as to its value from these conversations, and collecting the ground rent for Mr. McDavitt.

Ques. 3. What is your present occupation, and how long have you been engaged in it?

Ans. Cashier of the Bank of Commerce since spring of 1873,
260 and was secretary five years previous to that in the Merchants' Insurance Company; have never been engaged in the real-estate business.

R. A. PARKER.

Oath and formalities waived as to this and deposition of E. McDavitt.

ESTES & ELLETT,
*Sol's for Compl't.*
MYERS & SNEED,
*Atty's for Defendant.*

(Endorsed:) 89. Equity. Mayor and Aldermen of Memphis v. Ensminger & Sears. Depositions of E. McDavitt and R. A. Parker. Filed Nov. 18, 1876. H. E. Andrews, clerk, by L. H. Pillsbury, d. c.

261 In the circuit court of the United States, western district of Tennessee.

MAYOR AND ALDERMAN OF MEMPHIS }
*vs.*
M. L. ENSMINGER & SEARS. }

Deposition of Bridget Powers, taken as evidence in the above cause on part of plaintiff, in pursuance of notice and by agreement of counsel to adjourn the taking from No. 15 Madison st., Memphis, to the office of the clerk of the United States circuit court for the western district of Tennessee, before whom and where the same was taken on November 18, 1876, commencing at 10¾ o'clock a. m.

Quest. 1 (by plaintiffs' sol'r). Please state your name, age, residence, and whether you know the parties to this suit.

Ans. My name is Bridget Powers; am thirty-two years old; reside in Memphis, Tenn., I know the parties to this suit.

Quest. 2 (by same). State whether you ever leased from the
262 City of Memphis the lot of land known as lot No. 10 of the navy-yard ground; if so, about what time you procured said lease, and the time for which it was to run.

Ans. I procured a lease of said lot No. 10, navy-yard ground, from the City of Memphis, about the 15th day of December, 1866, the time I do not remember; it was, I think, for twenty years, or more. It was the same as the old lease; you could know by the lease.

Ques. 3. Who has your original lease at this time.

Ans. Mr. W. M. Randolph, who used to be city attorney.

Ques. 4. About what time did you put up the buildings on said lot?

Ans. Early part of 1867.

Ques. 5. Were the buildings finished or not, when you first heard of the claim for U. S. taxes; state how this was?

Ans. Yes, sir; the house was complete when Mr. Sears came around and notified me that he had bought it for taxes.

Ques. 6. Please give the name of your husband?

Ans. John C. Powers.

263 Cross-examined by defendants, reserving all exceptions to competency and irrelevancy to the questions and answers in chief.

Quest. 1st. Who attended to the rental of the property and buildings on lot 10, from 1867 until the same was delivered to Mr. Sears in 1876?

Ans. I did not; I was from home a part of the time; I can't tell who; Mr. Powers got to rent it.

Ques. 2. Were not the rents paid to Mr. Powers, your husband, and did he not manage the renting of the property?

Ans. Yes; he did as near as I can remember.

Ques. 3. What was the cost of erecting these buildings?

Ans. Five thousand dollars for the two frame tenements; I can't say how much the brick cost.

Ques. 4. When were you first notified of Mr. Sears or Ensminger's claim to this property under his tax title?

Ans. Just about the time the building was completed.

264 Ques. 5. Are you the Mrs. Bridget Powers named as complainant in this suit.

Ans. I am.

And further saith not.

BRIDGET POWERS.

Subscribed and sworn to before me this November 18th, 1876.

L. H. PILLSBURY,
*U. S. Com'r for W. D. of T.*

It is agreed by solicitors that a verified copy of the lease from the City of Memphis to Mrs. Bridget Powers may be filed herein to be used as testimony in this cause, if otherwise competent and relevant.

S. P. WALKER AND
ESTES AND ELLETT,
*For City of Memphis.*
MYERS & SNEED,
*Atto's for Defendants.*

(Endorsed:) No. 89. Circuit court of the United States, western district of Tennessee. Mayor and Aldermen of Memphis vs. Ensminger & Sears. Deposition of Bridget Powers. Filed Nov. 13, 1876. H. E. Andrews, clerk; L. H. Pillsbury, d. c.

265 United States circuit court, district of West Tennessee.

MAYOR, &c., OF MEMPHIS
*vs.* } 89. Eq.
ENSMINGER & SEARS.

Deposition of John C. Powers, taken as evidence in the above cause on part of def't, in pursuance of a notice herein filed before the clerk of the circuit court of the United States for the district of West Tennessee, at the office of the clerk of said court on July 29th, 1876, commencing at 10 o'clock a. m.

Ques. 1. What is your name, age, residence, and occupation; and are you acquainted with the parties to this suit?

Ans. John C. Powers; age, fifty years; residence, in the city of Memphis; machinist. I am acquainted with the parties to this suit.

Ques. 2. Do you know the property described in the pleadings in this suit, situate in the city of Memphis, on Chickasaw street, fronting
266 fifty-five and extending through to Promenade, known as lot No. 10 on place of the navy-yard property.

A. I do.

Ques. 3. How long have you known this property, and have you ever resided there; if so, how long?

Ans. I have resided on this property from 1866 up to the present time.

Ques. 4. From whom did you lease this during the time mentioned, and on what terms?

Ans. My wife, Bridget Powers, leased this property from the city of Memphis during the administration of Mayor in 1866, for an unexpired term of lease of thirty years which ended in 1886. She agreed to pay under said lease a ground rent of one hundred & twenty-seven $\frac{10}{100}$ dollars, payable every six months.

267 Ques. 5. Did you or your wife make any improvements on said lot; if so, when were they put thereon, and what was their value?

Ans. In 1866 we built on this lot a dwelling, which cost me five thousand dollars; that building now stands on the lot.

Ques. 6. What was the rental value of said house and lot from June, 1867, up to July 20th, 1876?

Ans. The rentals varied during said years; for the first year and a-half, from June 10th, 1867, its rental value was one hundred dollars per month, after this from July, 1869, for one year, half of this house was rented to me by Sylvester Slater, at forty dollars per month; the other half the house was worth as much as the part rented, but was vacant for some time how long I can't say. Mr. John Sullivan occupied one-half of the house for about two years, at thirty-five dollars for the first
268 year and thirty dollars for the last year. I occupied the other half of this house during this time. There was a party that occupied this house between the times it was rented to Slater and Sullivan; their prices for rent was about forty dollars, but they paid no rent. Sullivan's lease did not commence till just after the yellow fever, which was in 1873. After Sullivan left it was then rented to the present tenant, Mr. Lord, who paid twenty-five dollars per month from the time of his entry to the

present time. I occupied the other half up to the present time. At this rental, which was the price at which this property as above shown was rented for the nine years, commencing the 10th day June, 1867, and ending the tenth of June, 1876, the sum total of this rent amounts the sum of seven thousand two hundred and seventy dollars.

269 Ques. 7. Do you know anything of the rental value of the house and lot occupied and built by McMahon, on the east end of this lot No. 10, fronting Chickasaw street, from June, 1867, to the present.

Ans. Mr. McMahon built this house, it being a store-room below and rooms above, in 1867, and occupied it from the time he built it to the time he left, which wast wo or three months since; he kept a saloon a part of the time in the lower part of the building, probably a year or so. The value rental of said house, I should say, was as follows: For the years of 1868 & 1869, was forty dollars per month; for the years 1870 & 1871, & 1872 and 1873, it was worth about thirty dollars per month, and from June, 1874, to the present time, I would say it was worth fifteen dollars per month.

270 This was a two story brick building, with a store-room below and rooms above for family.

Ques. 7. During the time referred to, to wit, from June, 1867, to the present time, what knowledge did you have of the rental value of real estate in the city of Memphis, if any?

Ans. During said time I rented some property in the city, and I think am pretty well acquainted with the value. And further deponent saith not.

JOHN C. POWERS.

Subscribed and sworn to before me this 29th day July, 1876.

H. E. ANDREWS, *Clerk.*

(Endorsed:) Mayor & Aldermen of the City of Memphis et al. vs. Ensminger et al. 89 E. D. Deposition of John C. Powers. Filed Nov. 19th, 1876. H. E. Andrews, cl'k. L. H. Pillsbury, d. c.

271 THE MAYOR AND ALDERMEN OF CITY of Memphis. *vs.* ENSMEZER & J. J. SEARS. } No. 89. Equity.

*Report of Clerk Andrews.*

The clerk was, by an order of reference made and entered in this court on the 27th day of Dec., 1873, directed to take and state an account of damages suffered by the defendants herein by reason of the injunction iss'd in this cause on the 10th day of June, A. D. 1867, and to report the same to the court, and in conformity to said order would respectfully report:

After giving due and legal notice to both parties that an account would be taken herein as by the court directed, and having given due and legal notice to the respective parties to produce their witnesses, the complainants duly appeared at the office of the clerk of this court, on the

272 29th day of July, 1876, and at that time and at subsequent times to which adjournments were had, the following witnesses for the complainants & def't were examined and is herewith filed, to wit, John C. Powers, Hugh Nott, E. McDavitt, Robert H. Parker, and Bridget Powers, and

their testimony constitutes all of the evidence before the clerk. From this the clerk finds that the property described in the pleadings herein to be a double frame tenement house, which cost five thousand dollars, and a brick house upon the same lot. The first was erected in 1867, early in the season, and the latter was built late in the same year. The amount of defendants' damages suffered by reason of the injuction are found to be the rentals for these houses for each month from 1867 to 1876, with interest computed on each month's rental from the time it became due up to July, 1876. The calculations in full, as made by the clerk, are hereto appended and damage of defendants fixed at $12,962.10.

273 *Table on monthly rentals & interest on same.*

FIRST.

Double tenement frame house, 18 months.

| | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| June | 10, '67, | to | July | 10, '67, | $100.00 | ; | int. | to | July | 10, | 1876, | $54.00 | | 154 00 |
| July | " " | " | Aug. | " " | 100.00 | ; | " | " | " | " | " | 53.50 | | 153 50 |
| Aug. | " " | " | Sep. | " " | 100.00 | ; | " | " | " | " | " | 53.00 | | 153 00 |
| Sept, | " " | " | Oct. | " " | 100.00 | ; | " | " | " | " | " | 52.50 | | 152 50 |
| Oct. | " " | " | Nov. | " " | 100.00 | ; | " | " | " | " | " | 52.00 | | 152 00 |
| Nov. | " " | " | Dec. | " " | 100.00 | ; | " | " | " | " | " | 51.50 | | 151 50 |
| Dec. | " " | " | Jan'y, | 1868, | 100.00 | ; | " | " | " | " | " | 51.00 | | 151 00 |
| Jan'y | " '68, | " | Feb., | " | 100.00 | ; | " | " | " | " | " | 50.50 | | 150 50 |
| Feb. | " " | " | March, | " | 100.00 | ; | " | " | " | " | " | 50.00 | | 150 00 |
| M'ch | " " | " | Ap'l, | " | 100 | ; | " | " | " | " | " | 49.50 | | 149 50 |
| Ap'l | " " | " | May, | " | 100 | ; | " | " | " | " | " | 49 | | 149 00 |
| May | " " | " | June, | " | 100 | ; | " | " | " | " | " | 48.50 | | 148 50 |
| June | " " | " | July, | " | 100 | ; | " | " | " | " | " | 48 | | 148 00 |
| July | " " | " | Aug., | " | 100 | ; | " | " | " | " | " | 47.50 | | 147 50 |
| Aug. | " " | " | Sept., | " | 100 | ; | " | " | " | " | " | 47 | | 147 00 |
| Sept. | " " | " | Oct., | " | 100 | ; | " | " | " | " | " | 46.50 | | 146 50 |
| Oct. | " " | " | Nov., | " | 100 | ; | " | " | " | " | " | 46 | | 146 00 |
| Nov. | " " | " | Dec., | " | 100 | ; | " | " | " | " | " | 45.50 | | 145 50 |

Same building, 12 months.

| | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Dec. | 10, '68, | to | Jan'y | 10, | 1869, | $80 | ; | int. | to | July | 10, | '76, | $36.00 | 116 00 |
| Jan'y | " '69, | " | Feb. | " | " | 80 | ; | " | " | " | " | " | 35.60 | 115 60 |
| Feb. | " " | " | M'ch | " | " | 80 | ; | " | " | " | " | " | 35.20 | 115 20 |
| M'ch | " " | " | Apr. | " | " | 80 | ; | " | " | " | " | " | 34.80 | 114 80 |
| | | | Am't carried forward | | | | | | | | | | | $3,157 10 |
| 274 | | | Am't brought forward | | | | | | | | | | | $3,157 10 |
| | Apr. 10, '69, | to | May | 10, | '69, | $80 | ; | int. | to | July | 10, | '76, | 34.40 | 114 40 |
| May | " " | " | June | " | " | 80 | ; | " | " | " | " | " | 34.00 | 114 00 |
| June | " " | " | July | " | " | 80 | ; | " | " | " | " | " | 33.60 | 113 60 |
| July | " " | " | Aug. | " | " | 80 | ; | " | " | " | " | " | 33.20 | 113 20 |
| Aug. | " " | " | Sep. | " | " | 80 | ; | " | " | " | " | " | 32.80 | 112 80 |
| Sep. | " " | " | Oct. | " | " | 80 | ; | " | " | " | " | " | 32.40 | 112 40 |
| Oct. | " " | " | Nov. | " | " | 80 | ; | " | " | " | " | " | 32.00 | 112 00 |
| Nov. | " " | " | Dec. | " | " | 80 | ; | " | " | " | " | " | 31.60 | 111 60 |

Same property, 12 months.

| | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Dec. | 10, '69, | to | Jan. | 10, | '70, | @ $70.00 | ; | int. | to | July | 10, | '76, | $27.30 | 97 30 |
| Jan. | " 1870, | " | Feb. | " | " | " 70 | ; | " | " | " | " | " | 26.95 | 96 95 |
| Feb. | " " | " | M'ch | " | " | " 70 | ; | " | " | " | " | " | 26.60 | 96 60 |
| M'ch | " " | " | Apr. | " | " | " 70 | ; | " | " | " | " | " | 26.25 | 96 25 |
| Apr. | " " | " | May | " | " | " 70 | ; | " | " | " | " | " | 25.90 | 95 90 |
| May | " " | " | June | " | " | " 70 | ; | " | " | " | " | " | 25.55 | 95 55 |
| June | " " | " | July | " | " | " 70 | ; | " | " | " | " | " | 25.20 | 95 20 |

| | | |

| | | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Feb. | " | " | " | M'ch | " | " | " | 50; | " | " | " | " | " | 4.00..... | | 54 | 00 |
| M'ch | " | " | " | Apr. | " | " | " | 50; | " | " | " | " | " | 3.75..... | | 53 | 75 |
| Apr. | " | " | " | May | " | " | " | 50; | " | " | " | " | " | 3.50..... | | 53 | 50 |
| May | " | " | " | June | " | " | " | 50; | " | " | " | " | " | 3.25..... | | 53 | 25 |
| June | " | " | " | July | " | " | " | 50; | " | " | " | " | " | 3.00..... | | 53 | 00 |
| July | " | " | " | Aug. | " | " | " | 50; | " | " | " | " | " | 2.75..... | | 52 | 75 |
| Aug. | " | " | " | Sep. | " | " | " | 50; | " | " | " | " | " | 2.50..... | | 52 | 50 |
| Sep. | " | " | " | Oct. | " | " | " | 50; | " | " | " | " | " | 2.25..... | | 52 | 25 |
| | | | | Am't carried forward..... | | | | | | | | | | | $8,805 | 65 |

277 Am't brought up..... $8,805 65

| | | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Oct. | 10, '75, to Nov. 10, '75. @ $50; int. to July 10, '76, $2.00..... | | | | | | | | | | | | | | 52 | 00 |
| Nov. | " | " | " | Dec. | " | " | " | 50; | " | " | " | " | " | 1.75..... | | 51 | 75 |
| Dec. | " | " | " | Jan. 10, '76, | " | | | 50; | " | " | " | " | " | 1.50..... | | 51 | 50 |
| Jan'y | " | 1876, | " | Feb. | " | " | " | 50; | " | " | " | " | " | 1.25..... | | 51 | 25 |
| Feb. | " | " | " | M'ch | " | " | " | 50; | " | " | " | " | " | 1.00..... | | 51 | 00 |
| M'ch | " | " | " | Apr. | " | " | " | 50; | " | " | " | " | " | 75..... | | 50 | 75 |
| Apr. | " | " | " | May | " | " | " | 50; | " | " | " | " | " | 50..... | | 50 | 50 |
| May | " | " | " | June | " | " | " | 50; | " | " | " | " | " | 25..... | | 50 | 25 |
| June | " | " | " | July | " | " | " | 50; | " | " | " | " | " | 00..... | | 50 | 00 |
| | | | | Rental value of frame house..... | | | | | | | | | | | $9,264 | 65 |

SECOND.

Brick house on lot 10, 24 months.

| | | |
|---|---|---|
| 1868 & 1869, at $40 per month rent..... | $960 | 00 |
| " " " interest on rents due..... | 429 | 60 |
| 1870, '71, '72, & '73, @ $30 per month..... | 1,440 | 00 |
| " " " " " interest on rents due..... | 385 | 20 |
| 1874, 1875, & ⅓ of 1876 @ $15 per month..... | 450 | 00 |
| " " " " " interest on rents due..... | 32 | 65 |
| | $3,697 | 45 |

| | | |
|---|---|---|
| | $3,697 | 45 |
| Total value of rents on lot 10, navy yard..... | $12,962 | 10 |

From the above computations, based upon the testimony in the cause, the clerk finds as above stated.

Defendants' damages, by reason of the injunction issued June 10, 1867, $12,962.10.

Respectfully submitted,

HORACE E. ANDREWS, *Clerk.*

278 (Endorsed:) No. 89. Equity. Circuit court of the United States, western district of Tennessee. Mayor and Aldermen City of Memphis et al. vs. Ensminger and Sears. Clerk's report. Filed Nov. 20, 1876. H. E. Andrews, clerk; by L. H. Pillsbury, d. c.

279 MAYOR AND ALDERMEN OF THE CITY of Memphis and Bridget Powers
*vs.*
MARMADUKE E. ENSMINGER AND J. J. SEARS. } No. 89. Equity docket.

In the circuit court of the United States western district of Tennessee.

The complainant, the Mayor and Aldermen of the City of Memphis, excepts to the report of the clerk and master filed herein, on 20th day of

November, 1876, and assigns the following grounds of exception thereto, viz:

1st. It appears from the record that on 7th day of June, 1867, at the institution of this suit, and in obedience to the fiat of the judge who granted the injunction, the complainants in the suit executed and delivered an injunction bond, with sureties thereon, in the penalty of three thousand dollars, conditioned that if the said Mayor & Aldermen of the City of Memphis and Bridgett Powers shall pay all costs and damages that may
280 be recovered against them in consequence of the suing out of said injunction, and shall abide by and perform the order, sentence, or decree of said court in said cause, then this obligation to be void; otherwise to remain in full force and effect. Now, the report of the master finds and fixes the damages of the defendants, suffered by them by reason of said injunction, at $12,962.10, which is an excess of the penalty of said injunction bond, $9,962.10. In awarding damages in this case the court cannot go beyond the penalty of the bond and award greater damages than such penalty, and to the extent of this excess said report is erroneous, and this hon. court cannot give a decree therefor.

2d. The master in said report has assessed and reported the damages wholly upon the testimony of the witnesses, Powers and Nott, and has disregarded the testimony of the complainants' witnesses, McDavitt
281 & Parker, whose estimates of the values of the rents are much below those of defendant's witnesses above named, and whose opportunities of knowing the values of them were as good as those of the other witnesses.

3rd. The rental values of said property, as fixed by the master in his report, are too high, and not warranted by the weight of the evidence in the cause. The master has allowed in his report 960$ per annum for the rent of the frame tenements from January, 1869, to January, 1870; he has allowed 840$ for the same property for the year 1870; he has allowed 720$ for the year 1871, & 50$ per month from December 10, 1871, to July, 1876. This is not sustained by the evidence. The witness R. A. Parker, in his deposition, fixes the annual rental value of said property, from 1869 to 1876, at $250, and the witness McDavitt fixes the rental value, from 1869 to 1873, at from $25 to 40$ per month for each tenement, and from 1874 as at 15$ per month; and he shows the rates at
282 which he rented other adjacent property of much greater value.

4. The master in his report has allowed interest on said rental values, and has allowed interest on monthly instalments of said rents. This is not warranted by law or by the evidence in the case.

5. The master has failed and omitted in his report of damages suffered by the defendants, which he measures by the rents and profits of the real estate to recoup and set off against such rents, the value of the improvements of a permanent nature which the evidence shows were placed on said property bona fide and without notice of the defendants' tax title or of any adverse claim or title to said property. The evidence shows that the value and cost of these permanent improvements was $5,000, and in estimating and fixing the damages by way of mesne profits these valuable improvements should be set off against the rents.

6th. The master in his report in assessing defendant's damages
283 has allowed the rents of said property in gross without any abate-

ment of taxes, insurance or repairs. He should have inquired into these matters and abated the gross amount of the rents by the amounts of such taxes, insurance and repairs.

7th. Said complainant further and especially excepts to said report, and protests against any judgment or decree therein, or in any manner by this hon. court for any supposed damages arising out of the issuance of the injunction in this cause, for the reason that this hon. court as a court of chancery under the laws of the United States and the rules of practice governing the Federal courts has no power or jurisdiction to assess and decree damages against the complainant and the other obligees in the injunction bond. This hon. court must leave the defendants to proceed at law for their damages, if any have been sustained, and cannot in
284 this suit or in this mode decree damages for the wrongful issuance of the injunction. For these and other causes the said complainant excepts to said report of the master and to any action thereon by this hon. court, and prays judgment, &c.

ESTES AND ELLETT, *Sols.*

(Endorsed:) 89. Equity. Mayor and Aldermen of Memphis, et al, vs. M. E. Ensminger, et al. Exceptions of complainant to report of clerk and master. Filed Dec. 1, 1876. H. E. Andrews clerk. L. H. Pillsbury, d.c.

285 UNITED STATES OF AMERICA,
*Western District of Tennessee:*

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its Nov. term, A. D. 1877, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 11th day of January, A. D. 1878, in the following cause, to wit:

MAYOR & ALDERMEN OF MEMPHIS ET AL., plaintiff',
*vs.*
M. E. ENSMINGER ET AL, DEFENDANT. } No. 89. Eq.

Be it remembered that this cause was finally heard on this 11th day of January, 1877, upon the former proceedings, the report of the master filed herein on 20th November, 1876, and the exceptions of the complainants thereto filed on 1st December, 1876, and upon agreement and full consideration, the court being of opinion that complainants' 7th exception to said report is well taken, and ought to be sustained; and further that
286 this court has no jurisdiction to assess and decree damages against the obligors in the injunction bond. And that so much of the decree entered in this cause on 27th day of December, 1873, as orders a refence to the master to take and state an account of the damages suffered by the defendants herein, by reason of the injunction issued in the cause on the 10th day of June, 1867, was improvident and exceeded the power of the

court; that said 7th exception to said report be allowed and sustained, and that the bill be dismissed.

The defendants will pay the costs of the proceedings occurring since the rendition of the decree of December 27th, 1873, connected with the order of reference and report in this cause, for which let execution issue, and the complainants will pay all other costs, for which let execution issue. This decree shall in no wise prejudice the right of the defendant to sue
287 at law upon the injunction bond in this cause.

288 THE UNITED STATES OF AMERICA,
*Sixth Circuit and District of West Tennessee:*

I, Bell W. Etheridge, clerk of the circuit court of the United States for said district of West Tennessee, do hereby certify that the paper hereto attached is a full, true, perfect, and correct copy of the original record and proceedings in said court, as the same now appear of record and upon the files in my office, in the following cause, to wit, Mayor & Aldermen of City of Memphis vs. Ensminger & Sears, 89.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office in the city of Memphis, this 6th day of April, A. D. 1880, and of the Independence of the United States the 104th year.

[SEAL.] BELL W. ETHERIDGE, *Clerk.*
, *D. C.*

289 I, Bell W. Etheridge, clerk of the circuit court of the United States for the western district of Tennessee, do certify that this transcript has been unavoidably delayed, owing to the loss of the appeal bond, which, after diligent search, was discovered about five weeks since.

[SEAL.] BELL W. ETHERIDGE,
*Clerk of said C't.*

(Indorsement on cover:) No. 213. Marmaduke L. Ensminger, appellant, vs. John C. Powers and Bridget Powers. W. Tennessee C. C. U. S. Filed 22 April, 1880.

3326——7

108-292

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1882.

**No. 213.**

MARMADUKE L. ENSMINGER, Appellant,

*vs.*

JOHN C. POWERS and BRIDGET POWERS, Appellees.

Appeal from the Circuit Court of the United States for the Western District of Tennessee.

## BRIEF FOR APPELLANT.

NATH'L WILSON,
W. B. GILBERT,
*Of Counsel.*

*Thomas McGill & Co., Law Printers, Washington, D.C.*

# Supreme Court of the United States.

No. 213.—OCTOBER TERM, 1882.

MARMADUKE L. ENSMINGER, Appellant,

*vs.*

JOHN C. POWERS and BRIDGET POWERS, Appellees.

## BRIEF FOR APPELLANT.

### Statement.

This is an appeal from a decree of the Circuit Court of the United States for the Western District of Tennessee, in a cause wherein John C. Powers and Bridget Powers, his wife, citizens of Tennessee, are complainants, and Marmaduke L. Ensminger, a citizen of Illinois, J. J. Sears, his agent, and the city of Memphis were defendants.

Before the decree was entered the bill of complaint was dismissed as to the city of Memphis.

Record, p. 23.

Sears having died during the progress of the cause, the suit, as to him, was abated.

Record, p. 46.

The bill of complaint was filed in the Court below on the 9th of September, 1876, to revise, review, and set aside two decrees entered, respectively, on the 27th day of De-

cember, 1873, and the 19th day of June, 1876, by the Circuit Court of the United States for the Western District of Tennessee, in a cause wherein the city of Memphis and the said Bridget Powers were complainants, and the said Ensminger and the said Sears were defendants.

These decrees determined the ownership and right of possession of a lot of ground in the city of Memphis, claimed by Ensminger, under a tax sale and certificate made to him on the 24th of June, 1864, by the commissioners acting under and in pursuance of the acts of Congress approved August 5, 1861, June 7, 1862, July 6, 1863, and claimed by Bridget Powers under a lease made to her by the city of Memphis on the 28th of February, 1866.

The bill of complaint, in the cause in which said decrees were rendered, and which was sworn to by John C. Powers, as agent for Bridget Powers, was filed on the 22d of May, 1867.

It alleged that the city of Memphis was then the owner in fee of a tract of land, [including the lot in controversy, known as Lot No. 10,] which, in 1844, was dedicated by the original proprietors to the United States, in fee, to be used for naval purposes, and which the United States subsequently, in 1854 or 1855, donated in fee to the city of Memphis; that the city entered into possession, and, from time to time, leased lots to various persons; that on the 28th of February, 1866, it leased the lot in controversy to the said Bridget Powers for the term of twenty years; that the said Bridget Powers took possession of said lot under said lease, and had held possession up to the time of filing said bill; that the said Ensminger was then setting up some pretended claim to said lot as a purchaser at a pretended sale of the same, made by the United States direct tax commissioners, in June, 1864, and had procured the said tax commissioners to issue a writ of possession to him for said lot, on the 30th of April, 1867; and that the said tax sale was entirely null and void, and communicated no title

to said Ensminger, because in violation of the Constitution of the United States, and because the assessment was without authority and illegal, and the advertisement and sale irregular.

The bill prayed for an injunction against the execution of said writ of possession, restraining the said Ensminger, and his agent, from disturbing the possession of the said Bridget Powers, and that the claim of the defendant, Ensminger, a cloud on the title of the city of Memphis might be removed by such decree as might seem right and proper, and that the complainants should have such other relief as might seem reasonable.

An injunction was thereupon issued as prayed.

Record, pp. 54, 55, 56, 57.

The answer of Ensminger declared his ignorance of the facts alleged in the bill relative to the title of the city of Memphis, and the lease to the said Bridget Powers, and called for strict proof thereof, and declared the validity of the title conveyed to him by the tax sale and certificate of the commissioners, and denied the irregularities set forth in the bill.

A copy of the tax certificate is appended to the bill.

Record, pp. 60, 61.

Proofs were taken tending to show that Lot No. 10 was within the boundaries of what is known as the Navy Yard property, granted to the city of Memphis by Act of Congress passed August 3, 1854, and an agreement was filed that all the testimony taken on either side, in any of the several suits then pending, involving the validity of the sales made by the direct tax commissioners, might be read in evidence on behalf of either party.

Record, pp. 62, 63.

On the first of December, 1870, it was decreed that no sufficient cause was shown for the perpetuation of the in-

junction previously granted, and that it should be dissolved, and the Court proceeded to adjudge as follows:

"And it appearing, to the satisfaction of (the court), that the premises in the pleadings referred to, to wit, Chickasaw street fifty-five and 7-100 feet by one hundred and seventy, lot 10, assessed to G. McLean, in 1860, fifth civil district, city of Memphis, was duly sold at the time specified, in the defendant's answer, by the United States direct tax commissioners, John B. Rogers, E. P. Ferry, and Delano T. Smith, under the Act of Congress referred to in the pleadings; that at said sale the defendant, Marmaduke L. Ensminger, became the last and highest bidder, and the purchaser of said premises, and that he hath acquired a title in fee-simple to the same, together with the right of possession therein, and that his claim thereto is no cloud upon any title held by the complainant, it is further ordered and decreed that the said M. L. Ensminger have a writ of possession, to be issued to the Marshal of the United States for this District, to the end that he may be put in peaceable possession of said premises."

Record, p. 63.

A reference to the clerk was made to ascertain the damages occasioned by the issuing of the injunction.

From this decree an appeal was taken, and allowed, to the Supreme Court of the United States, and an appeal bond given, in which the city of Memphis and Bridget Powers were principals, and John C. Powers surety.

Record, p. 64.

At the same time a bill of exceptions was filed, which set forth certain objections made to the entry of the decree by Judge Trigg, on the ground that Judge Emmons, before whom the case had been argued, had decided only that the acts of Congress were constitutional, and the proceedings of the commissioners regular, and that no decree could be made by Judge Trigg.

Record, pp. 65, 66.

At the October Term of this Court, in 1875, on motion, the appeal thus taken was docketed and dismissed, with costs, and the cause remanded to the Circuit Court.

Record, p. 70.

On receiving this mandate the Circuit Court, on June 19, 1876, rendered a decree referring to the appeal to this Court from the decree of December 23, 1873, and the dismissal of the appeal, and ordered that the order of reference previously made to the clerk, to state an account of the damages sustained in consequence of the issue of injunction, be renewed.

Record, p. 70.

On the following day, June 20, 1876, the Court, on motion, passed an *order* that an alias writ of possession issue to the Marshal of the Western District of Tennessee, commanding him to place the defendant, Ensminger, in possession of the premises described in the pleadings.

Record, p. 71.

It does not appear, from the record, that this writ was ever executed, or that Ensminger obtained possession.

It does appear, however, that a few days after the entry of the above order, that is to say, on the 25th day of July, 1876, the said John C. Powers and the said Ensminger, by his agent, became parties to an indenture of lease, whereby the said Ensminger leased, to the said Powers, a part of the lot in controversy, for a term commencing July 20, 1876, and ending December 19, 1876, and the said Powers agreed to pay a stipulated rent therefor, to keep the premises in good repair and to surrender the same at the expiration of the lease.

Record, pp. 16, 17.

The rent stipulated for in the lease was paid, for two or three months, by Bridget Powers.

Mrs. Powers herself testifies that when they found that Ensminger was about to obtain possession of the property, under the decree of the Court, she and her husband, in in order to keep possession of the property, agreed to rent of Sears, as agent for Ensminger.

Record, p. 49.

On the 24th of July, 1876, John C. Powers and Bridget Powers were notified, by the city of Memphis, that the said lease to Bridget Powers was forfeited and terminated by reason of the breach, on the part of the lessees, of the terms and conditions of the lease.

Record, p. 18.

Under the decree of the 27th of December, 1873, the clerk proceeded to take testimony and an account of the damages suffered by reason of the injunction, and made a report.

To this report exceptions were filed, one of them being that the Court had no jurisdiction to decree damages against the complainants.

On the hearing, the Court being of opinion that so much of the decree entered on the 27th of December, 1873, as ordered a reference to the clerk to take and state an account of the damages suffered by reason of the injunction, was improvident, and exceeded the power of the Court, adjudged that said exception be sustained, and dismissed the bill by a decree made on the 11th day of January, 1877.

Before the decree last mentioned was entered, that is to say, on the 9th of September, 1876, the bill of complaint was filed in the cause now before this Court, by John C. Powers and Bridget, his wife, complainants.

Record, pp. 88 and 89.

The bill in this case alleges that the complainants, John C. and Bridget Powers, are husband and wife, having been married in 1862, and are citizens of Tennessee; that

Ensminger is a citizen of the State of Illinois; and the city of Memphis a municipal corporation.

It alleges that, on the 28th of February, 1868, the city of Memphis made a lease in writing, to Bridget Powers, one of the complainants, for the term of twenty years, of the said Lot No. 10; that in the year 1861, and before and since that time, the title to the said lot was in the city of Memphis, which held the same as public property for municipal or public purposes, and was not subject to taxation; that at the time said lease was made, said lot was vacant and unoccupied, and was thereupon taken possession of by the said Bridget Powers, who erected thereon, at a cost of nine or ten thousand dollars, valuable improvements; and that after said improvements had been commenced and partly completed, the complainants were informed that the said Ensminger claimed to be the owner of said lot under a tax sale and certificate made by the direct tax commissioners.

The bill then sets forth the suit instituted by the city of Memphis and Bridget Powers against the said Ensminger, and the proceedings therein as they have already been stated, and makes the record in said cause a part of the bill of complaint.

It further alleges that the sale to Ensminger by the direct tax commissioners was void and conveyed to him no title, because the premises were not subject to taxation, and for the same reasons that were stated and relied upon to invalidate the sale in the bill filed by the city of Memphis.

It alleges that after the mandate was issued by this Court, in the first suit, and after the decree made in the Circuit Court after the mandate was filed, the said Ensminger and the said Sears dispossessed the complainants and compelled the complainant John C. Powers to take a lease from Ensminger, in order to avoid being turned out, and to execute certain notes for rent, one or more of which had then been paid.

It alleges that the decree of December 27, 1873, and the proceedings in said suit, were void, and not binding on the complainants, or either of them, because when said bill was filed, and ever since that time, the said Bridget Powers was a married woman, and her husband, John C. Powers, was not a party thereto; that the said decree was void because, at the time it was rendered, the cause was not at issue, and because it was not the deliberate judgment of the Court upon the facts in the record; that the decrees of December 27, 1873, and of June 19, 1876, so far as they undertook to decree the validity of the title to the defendant Ensminger, or to award a writ of possession, or to do anything more than to dismiss the bill, departed from the established practice of the Court, and were void, or at least wholly erroneous, and that it was the duty of the Court, by proper orders and decrees, to protect the complainants in the positions they occupied before said decrees were rendered.

It alleges that the complainants *or* the complainant Bridget has a good title to the premises in question for the term of her lease; that the said Ensminger has no title thereto; that if this claim is unfounded, then the said Ensminger should be required to pay them the value of the improvements on said premises; and that if both of said claims are unfounded the city of Memphis should make good to them the valde of said improvements.

The prayer of the bill is as follows:

"That on the final hearing it may be decreed that the plaintiffs or the plaintiff Bridget, have a good and indefeasible right for the term of the said lease, and subject to the conditions thereof, to the said leased premises; that the pretended sale to the said Ensminger by the said direct tax commissioners, and the certificate of purchase granted by them, be cancelled and declared void; that the decrees of this court pronounced, as aforesaid, in the year 1873 and in 1876, respectively, may be revised, reviewed, and set aside, so far as they conflict with, or may be in the way

of, the relief herein prayed; that the said Ensminger and the said Sears, and their agents and attorneys, may be enjoined, by the order of the court here, from collecting rent for the said premises from the plaintiffs or either of them, and from interfering with their possession and control of the same, and from collecting, assigning, or in any way disposing of the notes given, as aforesaid, by the plaintiff John C. Powers, for the said rent; that the said notes and the lease given by the said Ensminger and Sears to the plaintiff, John C., may be set aside, vacated, and cancelled; that the proper accounts may be taken to ascertain the sums due; and that the plaintiffs may have all other just, proper, and necessary relief."

Record, pp. 1–10.

The bill was demurred to for the following reasons:

The bill, purporting to be a bill of review, was filed without leave of the Court.

The bill showed no error of law on the face of the decree, and no new matter discovered since the commencement of the suit.

The bill, if relied on as an original bill, showed that all the rights and equities therein set up were finally adjudicated in the first suit between the same parties.

The lease or conveyance, to Bridget Powers, of property held for public purposes, was void.

All questions as to the legality of Ensminger's tax title were adjudicated in the former suit.

The complainants' remedy was against the city of Memphis.

The bill sought relief against the city of Memphis, on the ground that, at the time of the lease to the complainants, Ensminger had a good title to the property.

There is a misjoinder of parties.

The bill is multifarious.

The lease to the complainant John C. Powers had been terminated before the institution of this suit.

The lease is conditional, and the bill fails to show compliance with the conditions, and was void in its inception.

There is no equity in the face of the bill.

Record, p. 20.

This demurrer was overruled, and an order passed giving leave to the complainants to file their bill already in Court as a bill of review, and giving leave to the defendants to incorporate the matters of the demurrer in their answer.

By the same order an amendment of the bill was allowed, dismissing so much thereof as prayed relief against the city of Memphis.

Record, p. 22.

The defendants, Ensminger and Sears, thereupon filed their answer, in which the chief averments are, that, in 1860, the lot in dispute was assessed to one G. McLean, and was subject to the tax for which it was assessed, having been, before that time, leased by the city of Memphis, because it was not needed for public purposes; that said lot was sold by the direct tax commissioners, and was purchased by Ensminger, in exact compliance with the statute in such case made and provided; that the bill of complaint, filed by the city of Memphis and Bridget Powers, was sworn to, and the said suit was, in fact, instituted and prosecuted, by the said John C. Powers, who was, at the time of the commencement of said suit, and at the time of making said answer, the husband of the said Bridget, and that the said bill set up and claimed all the rights and equities which are sought in this suit; that the defendants made the same defense in answer to said bill as is herein alleged, all of which was adjudicated and determined by the decree of the Circuit Court; and that the decision of the Court in said cause is a bar to the present suit, and is pleaded as such. The answer further stated as grounds of defense the objections set forth in the demurrer.

Record, pp. 25 to 30.

After the filing of the replication, testimony was taken on behalf of the complainants for the purpose of proving how the city of Memphis derived title to the lot in dispute, and that, at the time of the tax sale, the property was not under lease.

The evidence, however, wholly failed to establish the averment that the lot had not been leased prior to the lease to Bridget Powers.

It did show that, for the years 1860, 1865, 1866, and 1867, it was assessed to G. W. McLean.

Record, p. 39.

The only testimony tending to prove that there was no lease, was that of Thomas Foley, who testified that he never knew of any one asserting a claim of lessee, or otherwise, to the Powers lot.

Record, p. 33.

The testimony of Sears, however, tends to prove that the lot was, in fact, leased to the person to whom it was assessed.

Record, pp. 40 to 44.

Upon hearing and considering the bill, answer, exhibits, and proofs, on the 19th of December, 1878, the Circuit Court entered a decree granting the relief prayed for, cancelling, setting aside, and annulling the decree of December 27, 1873, and the decree alleged to have been made on the 19th of July, 1876, on the filing of the mandate of this Court, and restoring to the complainants all that they had lost by said decrees; adjudging that the said Bridget Powers had a good and indefeasible title to said lot, subject only to the terms and conditions of said lease; enjoining the said Ensminger, his agents, etc., from setting up or asserting any title thereto; cancelling the lease made to John C. Powers, and the notes given for the rent; directing that an account should be taken of the taxes paid by

Ensminger; that a writ of possession issue in favor of the complainants; that the possession of the complainants be quieted, and that they recover the costs of both of said suits.

From this decree an appeal was prayed, and allowed, to this Court.

Record, pp. 44, 45, 46.

## Assignment of Errors.

The Court below erred—

1. In overruling the defendant's demurrer.

2. In entertaining the bill as a bill of review, and permitting it to be filed.

3. In cancelling and setting aside the decree entered by the Circuit Court of the Western District of Tennessee on the 27th day of December, 1873, in the suit of the city of Memphis and Bridget Powers against Ensminger and Sears.

4. In cancelling and setting aside the decree entered by said Court in said suit on the filing of the mandate of this Court.

5. In cancelling and setting aside said decree as being a decree entered on the 19th of July, 1876.

6. In decreeing the restoration to the complainants of all they lost under the said decrees of December 27, 1873, and July 19, 1876.

7. In adjudging that the plaintiff, Bridget Powers, has a good and indefeasible right and title, as against the defendants, for the term of her lease from the city of Memphis, in and to the lot 10 described therein.

8. In enjoining the defendant Ensminger from setting up or asserting title to said lot ten, under the tax certificate described in the bill of complaint.

9. In decreeing the cancellation of the lease made by Ensminger to Powers, and the notes given for the payment of the rent.

10. In directing an account to be taken of the rents paid in respect of said lot and of said notes.

11. In awarding a perpetual injunction against the said Ensminger in respect of the possession of said lot ten.

12. In awarding a writ of possession to the complainant.

13. In decreeing the confirmation to the said complainants of their possession of said lot under the lease from the city of Memphis.

14. In decreeing that the complainants have and recover against the defendants all the costs of this suit, and of the said suit of the city of Memphis and Bridget Powers against the said Ensminger, and that said costs be taxed by the Court, and execution issue therefor.

## ARGUMENT FOR APPELLANT.

It is apparent from the record that the complainants in this case are endeavoring to accomplish a greater number and a greater variety of results than ordinarily come within the scope of a suit in equity.

The bill seeks to have reviewed and set aside the two decrees complained of because of error of law obvious on the face of the record, and because of error of fact in relation to the coverture of one of the parties, and because of the omission of a necessary party, and because of fraud in obtaining the decrees.

It seeks to have re-examined and again adjudicated the questions of fact determined in the original suit relative of the proceedings of the direct tax commissioners, the validity of the tax sale and certificate made by the commissioners and the title to the lot of ground in controversy.

It also seeks to have the transactions which occurred between the complainants and the defendants, after the entry of the decrees alleged to be erroneous, made the subject of

judicial investigation, and to have a lease that was made and certain notes that were given in the course of those transactions cancelled and delivered up.

The Circuit Court permitted the bill to be filed as a bill of review.

It is, however, now asserted, in the brief for the appellees, that the bill is to be considered not only a bill of review for error of law and for error of fact, but also on original bill to impeach a decree for fraud and for want of necessary parties, and it is claimed that the bill is maintainable as a bill of review, as an original bill, and as an original bill in the nature of a bill of review.

## I.

THE BILL IS NOT MAINTAINABLE, EITHER AS A BILL OF REVIEW, OR AS AN ORIGINAL BILL, OR AS AN ORIGINAL BILL IN THE NATURE OF A BILL OF REVIEW, OR IN ANY OF THE ASPECTS IN WHICH IT IS PRESENTED, BECAUSE NOT FILED IN SEASON.

1. The decree of December 27, 1873, was unquestionably a final decree upon the merits of the controversy thereby determined. It was a decree from which an appeal could be and was in fact taken.

It is, therefore, a fatal objection to the bill as a bill to review that decree, that it was not filed until September 9, 1876, more than two years after the decree was entered.

In the case of Thomas *v.* Harvie's Heirs, 10 W., 146, this Court said:

"There is no statute expressly limiting bills of review, but the courts of the United States are governed in this particular by the analogous limitation of the right of appeal, and therefore a bill of review cannot be filed after the lapse of five years from the final decree. The rule here laid down has been repeatedly approved and enforced."

Whiting *v.* Bank of the U. S., 13 P., 6.

Kennedy *v.* Georgia State Bank, 8 H., 586.

After the change by statute of the time within which appeals can be taken to this Court, in the case of Clark *v.* Killian, 103 U. S., 766, this Court said:

"A bill of review is the appropriate mode of correcting errors apparent on the face of the record, and it was in this case filed in time, less than two years having elapsed since the original decree was passed."

2. The same objection applies to the bill if it be considered a bill impeaching the decree for fraud.

The right to maintain such a bill continues only a reasonable time after the discovery of the fraud.

Dan'l. Ch. Pr., 1584, 5th ed.

In the case of Evans *v.* Bacon, 99 Mass., 213, the Supreme Court of Massachusetts said:

"A fraudulent act is binding upon the party by whom it is committed, and voidable only at the election of the party defrauded. The right of a party injured to rescind a fraudulent transaction is one which may be waived and which will be lost by immoderate delay in its exercise. It remains only for a reasonable time after the discovery of the fraud. This rule is founded upon the plainest principles of justice and is of universal application. * * * * It is true there is no statute of limitations fixing a precise period of time after which the right to file a bill like the present is barred, but the limitation of a year for writs of review affords a close and forcible analogy."

Plymouth *v.* Russell Mills, 7 Allen, 438.

The fraud which appears to be relied on in this case consisted in the acts of the attorney of Ensminger in obtaining and of the Court in granting the decree of December 27, 1873. The circumstances were of course fully known to the complainants at that time. They were fully stated in the bill of exceptions then filed. No excuse whatever is given for the delay of three years after the perpetration of the alleged fraud.

3. The same objection applies, and for the same reasons, if the bill be considered an original bill, or an original bill in the nature of a bill of review to set aside the decree because of the absence of a necessary party.

It is alleged that John C. Powers should have been a plaintiff or defendant in the original suit.

If he considered himself aggrieved by the decree of December 19, 1873, it was incumbent for him to intervene without unnecessary delay for the protection of his rights; it was his duty to have moved at once for leave to file his bill of review.

Kidd *v.* Cheyne, 18 Jur., 348.

Having himself promoted the suit in the form in which it was brought, by verifying the bill as the agent of his wife, having been notified of the decree and aided in the appeal therefrom to this Court, having himself accepted a lease of the disputed premises from Ensminger, it was too late after the lapse of nearly three years from the date of the decree, and more than six years years from the time of filing the original bill, for him to claim that he should have been made a party to the suit which he himself caused to be instituted.

By his own laches he deprived himself of the benefit or right to which by the exercise of requisite and proper diligence he might have attained.

Plymouth *v.* Russell Mills, 7 Allen, 438.

4. It is not necessary that objection to the bill for not being filed in season be taken by plea.

It ought to appear on the face of the bill that it is so, or that the plaintiff is within the saving of the statute.

Dan'l Ch. Pr., 1581, 5th ed.

Shepperd *v.* Lane, 6 Mumf., 529.

U. S. *v.* Samperjac, 1 Hemp., 118.

5. It will perhaps be urged that the foregoing considerations do not apply to the bill of complaint so far as it seeks to have reviewed and set aside the decree entered on the 19th of June, 1876, on the receipt of the mandate of this Court, and that in respect of that decree at least the bill was filed in time.

On referring to said decree as it is set out on the 69th and 70th pages of the record, it will be seen that it recites the mandate of this Court, and decrees nothing more than the renewal of the order of reference made to the clerk by the decree of Dec. 27, 1873, to take an account of the amount of damages caused by the issue of the injunction.

The allegation in the bill, that upon the filing of the mandate of this Court, the Circuit Court entered a decree substantially the same as the decree first entered, dismissing the bill, adjudging the title of the defendants to be good, awarding possession, &c., is a manifest mistake.

As has been heretofore stated, when the Court came to consider the Master's report, made in pursuance of this decree, it made a final decree rescinding the order of reference and dismissing the bill. This decree was made after the bill of review was filed.

It is obvious that the decree entered on the 19th of June, 1876, was not a final decree, and could not, therefore, be the subject of a bill of review.

But if it was a final decree, it was made or purported to be made in pursuance of a mandate of this Court.

If there was any error in it, the error could only be corrected on direct application to this Court.

Southern *vs.* Russell, 16 H., 347.

## II.

IF, AS IS CLAIMED IN THE BRIEF FOR THE APPELLEES, THE BILL IS TO BE CONSIDERED A BILL OF REVIEW, AND AN ORIGINAL BILL TO SET ASIDE THE DECREES IN THE FIRST SUIT FOR FRAUD, AND FOR WANT OF PARTIES, AND ALSO A BILL TO OBTAIN RELIEF IN RESPECT OF ACTS COMMITTED AFTER THE RENDITION OF THE DECREES, IT IS DEMURRABLE, AND THE DEMURRER INTERPOSED THERETO SHOULD HAVE BEEN SUSTAINED.

In the case of Perry *v.* Phillips, 17 Vesey, Jr., 176, referred to in the brief for the appellees as authority for the form of the bill, Lord Eldon expressed great doubt whether a plaintiff can be permitted to put his case in the alternative as a bill of review, or if the Court should not think it such, then as a bill of review and supplement. He expressly declined to approve the bill in that case as having a tendency "to let in a mischievous practice."

In the case of Whiting *v.* The Bank of the United States, 13 P., 6, this Court held that a bill might be a compound bill of review of supplement and of revision, and maintainable as such if *it presents facts which go to the merits of the original decree.* It is plainly to be inferred from the opinion of the Court that the correctness and validity of the original decree was held to be the real subject for determination, and that facts ordinarily stated in a supplemental bill and in a bill of revivor might be necessarily incident thereto. Certainly no approval is therein expressed of the form of a bill like the one in this case, which presents facts which do *not* go to the merits of the original decrees, and which raise new and independent issues, some of which have no relation to the original decree.

The claims asserted in the bill are of so different a character, and the transactions which form the subject of the suit are so dissimilar, that they cannot be joined together in one bill.

Story Eq. P., Sec. 530, 9th Ed.

Berdanatti *v.* Sexton, 2 Tenn. Ch., 699.

## III.

IT IS OBVIOUS ON INSPECTION OF THE BILL THAT IT CANNOT BE MAINTAINED AS AN ORIGINAL BILL, OR AS A BILL OF ANY KIND TO SET ASIDE THE ORIGINAL DECREE FOR FRAUD.

The bill contains no allegation of fraud and no state of facts or occurrences which can be said to constitute fraud, actual or constructive.

The averment in the bill (page 7 of the record) that the decree of December 19, 1873, "was not the deliberate judgment of the Court," is certainly not sufficient to constitute an allegation of fraud; and the statement therein of the circumstances under which the decree was signed discloses no fraud or imposition in the sense in which those words are used when it is said that courts of equity may grant relief against decrees obtained by fraud.

The decree in question might be void, in view of the circumstances in which it had its origin, and for the reasons stated in the brief for the appellees. Yet it would not follow that it could, for the same reasons, be impeached for fraud.

A very plain definition of the kind of fraud for which decrees in equity may be impeached is given by Lord Cairns, in the case of Patch *v.* Wood, L. R., 3 Ch., app., 206. He there says:

"It is necessary to bear in mind what is meant and what must be meant by fraud when it is said that you may impeach a decree, signed and enrolled, on the ground of fraud. The principle on which a decree may be thus impeached is expressed in the case which is generally referred to on this subject, the Duchess of Kingston's case, when the judges being consulted by the House of Lords, replied to one of the questions: Fraud is an extrinsic collateral act which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal.

"The fraud there spoken of must clearly, as it seems to

me, be actual fraud, such that there is on the part of the person chargeable with it, the *malus animus*, the *mala mens* putting itself in motion, and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him."

In the same case Sir John Rolt, L. J., said:

"I think for the reasons that have been given by my learned brother that the fraud must be actual fraud, a meditated and intentional contrivance to keep the parties and the court in ignorance of the real facts of the case and obtain that decree by that contrivance. Then constructive fraud not originating in actual contrivance, but consisting of acts tending possibly to deceive or mislead, would probably not be sufficient."

Certainly nothing contained in the bill or in the record indicates the existence of any such fraud as that here declared to be essential to the granting of the relief here prayed for.

## IV.

THE BILL IS NOT MAINTAINABLE AS A BILL TO REVERSE THE DECREE OF DECEMBER, 1873, BECAUSE JOHN C. POWERS, THE HUSBAND OF BRIDGET, WAS NOT MADE A PARTY TO THAT SUIT.

It is alleged that when the original suit was instituted, and when the decree referred to was rendered, Bridget Powers was the wife of John C. Powers, although it did not so appear in the record of that suit.

The coverture is asserted in the present bill, and the absence of John C. Powers from the former suit as plaintiff or defendant, is asserted as "error of fact," for which the decree may be impeached.

It is submitted, however, that neither Bridget Powers nor her husband were necessary parties to that suit, which was really a suit between the city of Memphis and Ensminger to determine the title to lot 10, of which Bridget Powers was the lessee. The city of Memphis, claiming to

be the owner of the lot in fee, sought thereby to have removed the cloud upon its title, caused by Ensminger's claim that he was the owner in fee of the same lot by virtue of the tax certificate which he held.

In such a suit the lessee is not a necessary party, as his rights in the leased property are represented and can be protected by the lessor.

Story's Eq. Pl., 151, 9 Ed.

Schwoerer *v.* Boylston Market Ass'n, 99 Mass., 285.

But if the lessee, Mrs. Powers, was a proper or necessary party to the first suit, the omission of her husband, therefore, was of no legal consequence, as no injury to him or to her was occasioned thereby.

## V.

BUT IF NONE OF THE FOREGOING OBJECTIONS TO THE BILL ARE WELL FOUNDED, AND IF IT BE HELD THAT THE BILL IS PROPERLY A BILL OF REVIEW, OR AN ORIGINAL BILL IN THE NATURE OF A BILL OF REVIEW, THE DECREE ENTERED BY THE COURT BELOW IS ERRONEOUS.

I. The Court not only re-examined the questions of fact and the testimony presented by the record in the first case, but it considered new evidence adduced in relation to the same facts, and also to new and immaterial facts, and the decree results and is derived from a retrial of the first case upon new evidence.

It is too well settled to admit of discussion, that in a bill of review for error of law, questions of fact are not open for discussion.

The only questions that can be considered are such as arise on the face of the record without reference to the

evidence in the cause, and certainly without reference to any new evidence.

Whiting *v.* Bank of the United States, 13 P., 6.
Putnam *v.* Day, 22 Wall., 60.
Buffington *v.* Harvey, 95 U. S., 99.
Thompson *v.* Maxwell, 95 U. S., 391.
James *v.* Myrne, 7 Fed. R., 533.

In considering evidence to show that the former decree was erroneous in its findings of fact, and in entering a decree thereon, the Court below did what was equivalent to a hearing of the whole case, as though it had never been passed upon, and rendering an original decree.

As was said by the Supreme Court of Illinois in the case of Burgess *v.* Pope, 92 Ills., 255, "such a practice would permit parties, when dissatisfied with the finding of facts, to present evidence and have the facts passed upon again," and there would be no such thing as a definitive sentence in a chancery case.

II. The decree appealed from is erroneous on its face, because the relief thereby granted extended beyond the relief to which the complainants were entitled by the averments of their bill. It undertakes to annul the decree of Dec. 27, 1873, not only as to the complainants, but also as to the city of Memphis, and vests again in the city of Memphis the title of which it was divested by the first decree. The city of Memphis does not complain of that decree, and all that the complainants can properly ask is that they be protected in the possession of the property leased during the continuance of their lease, which expires Dec. 31, 1888. The complainants have no interest in the property after that date, and the Court below had no right on their complaint, but not on complaint of the city of Memphis, to set aside a decree to which the city of Memphis has made no objection, but has in effect acquiesced in and accepted,

which will entitle Ensminger to the lot in controversy after the expiration of the lease.

III. The decree is erroneous for the further reason that it recites that on the 19th of July, 1876, upon the filing of the mandate of this Court, a decree was entered dismissing the bill of Ensminger, adjudging the title of Ensminger to the lot in controversy to be good, awarding him possession and directing a reference to the clerk to state an account of damages, and then proceeds to reverse, vacate, and cancel said decree, whereas in point of fact no such decree was ever entered.

The decree referred to, is the decree of June 19, 1876 It did nothing more than reiterate the order of reference contained in the decree of December 19, 1873, and was not a final decree. The bill was dismissed by the final decree entered January 11, 1878.

Record, p. 88.

The decree now under consideration was made in December, 1878, nearly a year after a decree had been entered in the first suit dismissing the bill. This decree of dismissal has never been appealed from or made the subject of review.

IV. The decree is erroneous because it imposes on the defendant Ensminger all the costs of the first as well as of the last suit, notwithstanding the fact that the costs in the first case were imposed upon the complainants by the judgment and mandate of this Court.

## VI.

THE COMPLAINANTS ARE ESTOPPED BY THEIR ACTS FROM DISPUTING THE TITLE OF ENSMINGER.

The decree of the Circuit Court in the first case against the claim of title set up by the city of Memphis and Bridget

Powers as lessee, was, it is submitted, a finality as to that claim, and concluded all parties thereto and those in privity with them.

A judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties.

Russell *v.* Place, 606.

After that decree was rendered on the 29th of December, 1873, and after the appeal taken therefrom by Bridget Powers, in which her husband was her surety, was abandoned, the city of Memphis, on the 24th day of July, 1876, notified both John C. and Bridget Powers of the termination of the lease made to them by the city, and on the following day, July 25, 1876, John C. Powers accepted a lease from Ensminger and consented to pay him rent and to surrender possession on the termination of the lease. Rent was paid by John and Bridget Powers according to the terms of the lease from its date to the following September.

With full knowledge of the adjudication of the Court adverse to their title, and, as they claim, to prevent Ensminger from obtaining possession, Powers and his wife deliberately and voluntarily acquiesced in the judgment and decree of the Court, and became the lessees of Ensminger, and paid rent to him until they were prepared to file a new bill to re-open the controversy which had once been determined against them.

At the time of filing the bill, and at the time the decree was entered from which this appeal is taken, the appellees were in possession of the lot in controversy under lease from Ensminger. They were not, therefore, at liberty to controvert his title.

In the case of Blight's Lessee *v.* Rochester, 7 W., 546, Chief Justice Marshall said:

"The title of the lessee is the title of the lessor. He comes in by virtue of it, holds by virtue of it, and rests

upon it to maintain and justify his possession. * * * He cannot be allowed to controvert the title of the lessor without disparaging his own, and he cannot set off the title of another without violating that contract by which he obtained and holds possession, and breaking that faith which he has pledged and the obligation which is still continuing and in full operation."

Lucas *v.* Brooks, 18 Wall., 436.

## VII.

In the brief filed for the appellees it is said that the main question presented to the Court by the record "is whether the lot in controversy was exempt from taxation at the time the direct tax to the United States for the payment of which it was imposed was levied."

From this statement it is perhaps to be inferred, in the absence of the opinion rendered by the Court below, that the Court held that the lot was exempt from taxation, and based its decree upon that finding.

Under the decisions of this Court in the cases of Crosby *v.* O'Conner, 12 Wall., 391; De Treville *v.* Smalls, 98 U. S., 517, and Keely *v.* Saunders, 99 U. S., 441, none of the other questions relative to tax proceedings, sale, and certificate were open for consideration in the original case.

In the case last mentioned it was said by this court that:

"A tax sale certificate is, under the act of February 6, 1863, (12 Stats., 640,) *prima facie* evidence not only of a regular sale, but of all the antecedent facts which are essential to its validity and to that of the purchaser's title. It can only be affected by establishing that the lands were not subject to the tax, or that it had been paid previously to the tax sale, or that it had been redeemed according to the provisions of the act."

The averments in the first bill and in the bill in this case relative to the unconstitutionality of the law and the ir-

regularity and invalidity of the tax sale proceedings are wholly immaterial.

And, for the reasons already given, it is believed that although the question whether or not the lot in dispute was subject to the tax imposed was properly before the Court in the first cause, the same question could not properly be re-examined by the Court below in the light of new evidence, and cannot now be considered by this Court on appeal.

If, however, it be thought the legal predicament of the lot in controversy and its liability to taxation is a proper subject of inquiry and argument here, an examination of the record will show that the complainants have by no means made it apparent that the decree in the first case was erroneous.

It appears to be conceded that under the Act of Congress of August 5, 1861, and the laws of the State of Tennessee, the taxability of the lot in question depends upon the answer to the question whether it was under lease at the time the tax was assessed.

It could not be taxed if it was permanently or specially exempted from taxation by the laws of Tennessee or of the United States. The law of Tennessee which took effect February 20, 1860, exempted all buildings and grounds owned by the city of Memphis and used exclusively for public purposes, and such parts of the navy yard *as are not leased to private parties.*

The record in the first case shows that the Court found that said Lot 10 was "assessed to G. McLean in 1860," but it does not contain the evidence on which this finding is based.

Record, p. 64.

The testimony adduced in the present case, as shown in the foregoing statement, tends rather to prove than to disprove that the lot was under lease. This conclusion is con-

firmed by the covenant in the lease to Bridget Powers "to save her harmless from any damages hereinafter to be claimed by the original lessees of said lot."

Record, p. 15.

## VII.

The decree below should be reversed and the cause remanded with directions to dismiss the bill.

NATHANIEL WILSON,
W. B. GILBERT,
*For Appellants.*

108-292

OFFICE SUPREME COURT U. S.
FILED
DEC 29 1882
JAMES H. McKENNEY, Clerk.

# In Supreme Court of the United States

**AT OCTOBER TERM, 1882.**

No. 213.

MARMADUKE L. ENSMINGER,
—vs.—
JOHN C. POWERS AND BRIDGET POWERS, his wife.

**Appeal from the Circuit Court of the United States for the Western District of Tennessee, sitting in Equity.**

## Statement of Facts and Brief

—OF—

**WM. M. RANDOLPH,**

Of Counsel for John C. Powers and Wife.

S. C. TOOF & CO., PRS. & LITHS., MEMPHIS.

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FOR APPELLEES.

The original controversy was as to the validity of a sale for direct taxes alleged to have been due the United States upon a lot—a portion of the Navy Yard—belonging to the city of Memphis, made by the United States Direct Tax Commissioners at Memphis, in June, 1864, to Ensminger. The present suit is a bill for the purpose of reviewing, as well as an original bill, attacking for fraud a decree in a former suit between the city of Memphis and Mrs. Powers, on the one side, and Ensminger, on the other, whereby Ensminger's purchase at the sale for direct taxes was adjudged to have been valid.

Leave was given to file the bill as a bill of review. Record p. 22. And before the bill was filed the decree sought to be reviewed had been executed. Record pp. 71–72. The Navy Yard embraced in it ground fronting on the Mississippi and Wolf rivers, dedicated by the original pro-

prietors of the land whereon Memphis stands as and for a public landing, and also ground originally laid off into lots and sold as private property by the original proprietors. When the United States was about establishing the naval depot at Memphis, the city, by way of inducement, bought lots from 1 to 24 each inclusive, as laid off by the original proprietors, and conveyed them, along with a large part of the original public landing, to the United States, to the end that it might establish the Navy Yard. Of the lot in controversy, 148½ feet is made up of ground formerly included in lots from 1 to 24, and 22½ feet is made up of ground that was a part of the original public landing. Sear's deposition, record pp. 40, 41, 42, 43, 44. The dedication of the public landing by the original proprietors is in the record pp. 10–12, and the purpose declared was that "there should on said grounds forever be a landing or landings for public purposes of navigation or trade, and that the same should be forever enjoyed for those purposes." Record p. 11. When the United States discontinued the naval depot at Memphis, Congress, by an act approved about 5th August, 1854, (10 Statutes at Large, chapter 268, sec. 3, pp. 586–587,) ceded the ground which had been the Navy Yard to the city of Memphis, as the act declared, "for the use and benefit of said city." The city then laid off the ground into lots, and caused a map or plat thereof to be made and to be put of record, and made leases of portions not necessary for the purposes of the original dedication. Record pp. 2–3, 27, 44, 62–3, 32.

The lot in controversy, lot 10 of the Navy Yard property, was not leased prior to the lease to Mrs. Bridget Powers, to be stated below. Foley's deposition, record pp. 31–33, Sears' deposition, record pp. 42, 44. But it was sold by the United States direct tax commissioners at Memphis, on 24th June, 1864, under the act of Congress "for the collection of direct taxes in insurrectionary districts within the United States," and bought by Ensminger for $305.00,

and the commissioners granted to him a certificate of purchase accordingly. Record pp. 61–62. Ensminger's claim of title seems not to have been known, and on the 28th February, 1866, the city of Memphis made a lease of the lot for a little over twenty years to Mrs. Bridget Powers, then the wife of John C. Powers, at a yearly rent of $127.19, and the taxes to accrue. Record pp. 13–15. After the lease, Mrs. Powers put up buildings on the premises costing $4000, or $5000, and McMahon, her sub-tenant, put up other buildings, costing from $3000 to $5000. Record p. 32.

About May, 1867, Ensminger's claim of title seems to have been developed, he having had the direct tax commissioners issue on the 30th April, 1867, a writ of possession for the lot, and on the 10th June, 1867, a bill was filed by the city, joining Mrs. Bridget Powers, but not her husband, as a co-plaintiff against Ensminger, and Sears, his agent, for the purpose of enjoining the execution of the writ of possession and of having Ensminger's claim of title cancelled. The writ of injunction was granted and issued, as prayed for. Record pp. 54–60. Ensminger thereupon filed his answer to the bill. Record pp. 60–61. No replication to the answer seems to have been filed, but testimony was taken. At November term, 1873, (printed in the record at p. 63, "1870," by mistake, but correctly at p. 66,) Hon. Connally F. Trigg, the district judge then presiding, a final decree in the cause in favor of the defendants was entered under the following circumstances, which are detailed in a bill of exceptions then taken and filed, and ordered to form a part of the record in the cause. Record pp. 63–67.

The counsel for the defendants stated, when the cause was called for hearing, that he had been instructed by Judge Emmons, lately presiding at that term of the court, but who had then left Memphis, where the court was held, to enter decrees in the series of causes in the court known as "United States Tax Title Cases," in all such of those cases as fell within the purview of the decision Judge

Emmons had made in certain of those cases which Judge Emmons before that time had tried, and that he (the counsel) was to determine what cases came within the decision, the decrees, however, to be entered at the peril of the parties, because Judge Emmons would, upon a bill of review, set aside any decree so entered if it appeared to him by such bill of review that the case did not properly fall within his said decision. The counsel further said he had, at the suggestion of Judge Emmons, given a notice by a publication in the city papers that he would, on that day, proceed to take such decrees. He then read a list of the cases and designated such as he had selected to enter decrees in and such as he would pass. When the cause of the city of Memphis and Powers v. Ensminger and Sears was called and designated for decree as above, the counsel for the city of Memphis in open court, Judge Trigg then presiding alone, objected to a decree, and stated that the city attorney would insist that the cause did not come within the class of causes to which Judge Emmons had referred, and that the city would contend that its property was not liable to taxation and was exempt from taxation under an act of the Legislature, and that the proof showed the city was entitled to a decree. In reply the counsel for Ensminger and Sears insisted he was to be the judge of the cases in which he was entitled to take decrees and was to take them at his peril, subject to a bill of review, and that if the city attorney would convince him before the decree was entered that the case was not one proper for a decree he would not enter it. The counsel for the city then insisted that the presiding judge was to determine whether the decree should be entered or not. The presiding judge then remarked he did not know what Judge Emmons' decision was nor the scope of it; that he had promised him to have decrees entered in such cases as fell within the decision, and that he understood it was left to counsel for Ensminger and Sears to determine which were such cases, and that he would enter decrees in such cases

as the said counsel should designate, with the understanding that such proceedings were at his peril. It was then developed that Judge Emmons' order was not of record, nor his opinion, and that the opinion could not be found; and that the decision had been only that the act of Congress under which the tax sale had been made was constitutional and the proceedings of the commissioners regular, and that before a final determination of the case by Judge Emmons, and while he had it under advisement, the parties had compromised it, and there had been no decree. Counsel for the city of Memphis then again objected to a decree, because the case involved other objections than the constitutionality of the acts of Congress and the regularity of the proceedings of the commissioners appointed under them, and asked to have those questions argued. The counsel for Ensminger and Sears then again insisted that if the case contained other questions, the city could show it on a bill of review, and the decree would be set aside under Judge Emmons' order, and counsel for the city again objected that a bill of review would not lie, and insisted that the court should determine whether the case came within Judge Emmons' order for the entry of decrees. The court then decided that the counsel for Ensminger and Sears should enter a decree, as under Judge Trigg's agreement with Judge Emmons he had only to direct such decrees to be entered as the counsel should determine ought to be entered. To all this the city of Memphis at the time excepted, and tendered its bill of exceptions, which was signed by the judge and ordered to be filed.

An appeal from the decree so entered was then prayed by the city of Memphis and Mrs. Powers and granted, and an appeal bond given. Record pp. 64, 67, etc. The appellants failed to file the transcript, as required by law, and the appeal was docketed and dismissed in the Supreme Court of the United States on the 13th December, 1875. Record p. 70. The cause was thereupon remanded, and the circuit court pronounced a new decree, (record pp. 69–70.) and

proceeded to execute the decree of December 20th, 1873, by taking and stating the account therein ordered, and issuing the writ of possession thereby awarded. Record pp. 69–70, 71–72.

The present bill was thereupon filed by Mrs. Powers and her husband on the 9th day of September, 1876. Record pp. 1, 10. The city of Memphis was made a defendant because it refused to file the bill and undertook to escape from the lease it had made to Mrs. Powers by declaring it forfeited. Record pp. 6–7. The bill relied upon the facts transpiring when the decree in the suit of The City of Memphis and Powers v. Ensminger and Sears, set out in the bill of exceptions, and already stated, was entered, and upon the further fact that Mrs. Powers was, when the suit was brought and at the time of the decree, a married woman, and her husband was not joined with her in the suit, as the principal grounds for avoiding the decree. Record pp. 5–6. The fact that the cause was not at issue when the decree was entered, was also stated. But the main ground on which the decree was impeached, was that "the said decree was not the deliberate judgment of the court upon the facts in the record." Record p. 7. To avoid the sale made by the direct tax commissioners to Ensminger, among other facts, the bill relied upon (1) the exemption of the lot from taxation because it was a part of the public landing; (2) the fact that it was a part of the Navy Yard, and had not been leased to any one prior to the year 1866, when it was leased to Mrs. Powers, and, therefore, under a special act of the General Assembly of the State of Tennessee in force in the year 1861, it was exempt from taxation. And (3) the title to the lot was in the city of Memphis in the year 1861, and before and after that time, and it held the same as public property for municipal or public purposes as prescribed by law, and by the law of the State of Tennessee it was not liable to taxation, and hence was not subject to the direct tax levied by the Government of the United States. Record pp. 8–9. The prayer of the bill,

amongst other things, was for a decree cancelling the sale by the direct tax commissioners to Ensminger and his certificate of purchase, and giving Mrs. Powers the benefit of her lease, and for the revision, review and setting aside of the decrees of 1873 and 1876, respectively, so far as they conflicted with or were in the way of the other relief prayed. Record pp. 9–10.

There was a demurrer to the bill, which was overruled. Record pp. 19–20, 21–22. The defendants then answered, but nothing in their answer requires special notice here. Record pp. 25–30. There was a replication to the answer, and the cause was heard on the pleadings and proofs, and there was a decree for the plaintiffs in the bill, and the cause is here by an appeal on the part of the defendants. Record pp. 44–46. The decree first reversed and vacated the decrees in the former suit, then adjudged Mrs. Powers to have a good title under her lease, and lastly, perpetually enjoined Ensminger from setting up any title under his purchase from the direct tax commissioners, and cancelled such purchase.

# BRIEF.

## I.

The main question is, whether the lot in controversy was exempt from taxation at the time the direct tax to the United States, for the payment of which it was sold, was levied. The act of Congress levying the tax provided "that all property of whatever kind, coming within any of the descriptions of this act, and belonging to the United States, or any State, or permanently or specially exempted from taxation by the laws of the State wherein the same was situated at the time of the passage of this act * * * shall be exempted from the aforesaid enumeration and valuation, and from the direct tax aforesaid." Act of August 5th, 1861, 12 Statutes at Large, ch. 45, sec. 13, p. 297. And the act of June 7th, 1862, contained an exception of such lands and lots of ground "as are exempt from taxation by the laws of said State or of the United States." 12 Statutes at Large, ch. 98, sec. 1, p. 422. And one of the defences allowed to be made to an action based on the title derived under a sale made by the direct tax commissioners of lands within insurrectionary districts was "that the property was not subject to taxes." Act of 7th June, 1862, 12 Statutes at Large, ch. 98, sec. 7, p. 424. It is possible I might successfully maintain the proposition that the property which belonged to the city of Memphis, substantially belonged to the State of Tennessee, and that for that reason the lot in controversy was excluded from taxation by the express words of sec. 13 of the act of August 5th, 1861, already quoted. Such cases as Gilman v. Sheboygan, 2 Black 510, 515; United States v. Railroad Company, 17 Wallace 322, 329; Memphis v. Memphis Water Company, 5 Heiskell 495, 527; Luehrmann v. Taxing District, 2 Lea 425, and many others, seem to me to give support to the

proposition. But whether I am right in the position just stated, or not, I submit there can be no doubt that the lot, being the property of the city of Memphis under the dedication by the original proprietors, Wright v. Mayor and Aldermen of Memphis, 6 Yerger 497, or else by the grant contained in the act of Congress of 5th August, 1854, 10 Statutes at Large, ch. 268, sec. 3, p. 586–587, "was permanently or specially exempted from taxation by the laws of the State of Tennessee" at the time the direct tax was levied, and so was not subject to sale by the direct tax commissioners for the non-payment of the tax. By a statute of Tennessee, all property belonging to the State was exempt from taxation. Code of 1858, sec. 542, subsec. 2. And if I yield the position that the Navy Yard did not belong to the State in the sense of the statute of the State, so as to be exempt by the express words of the statute, I still contend it was exempt by necessary implication, because it was the property of the city, a municipal or public subdivision of the State, and was held by it for purposes purely public or municipal. The State formerly was the sole stockholder of the Bank of Tennessee, though the bank was an entirely separate and distinct corporation. Fields v. Wheatley, 1 Sneed 350; Bank of Tennessee v. Dibrell, 3 Sneed 378. Long before the property of the bank was declared by statute (see Code of 1858, sec. 542, subsection 2.) to be exempt from taxation, the Supreme Court held it to be exempt by necessary implication, saying: "No positive law was necessary to exempt the public property of the State from taxation by any of its corporations, or *quasi* corporations, as towns, cities or counties." Mayor and Aldermen of Nashville v. Bank of Tennessee, 1 Swan 269. In United States v. Railroad Company, 17 Wallace 322, already referred to, this court decided broadly that the property of a municipal corporation of a State was not subject to taxation by the National Government. The exemption was not placed on the fact that a statute so provided, but on the ground that a municipal corporation

is an auxiliary of the State, representing a portion of its governmental powers, and hence its revenues (meaning all its property, as I understand the case), like those of the State, are not subject to taxation by Federal authority. In other words, the court extended the doctrine of Collector v. Day, 11 Wallace 113, so as to protect the property of a municipal corporation from taxation by the United States. The extent of the decision may be seen by reference to the dissenting opinion of Justices Clifford and Miller, 17 Wallace 333–335, and the comments of the court upon the proviso in the amendments to the internal revenue law of 1866. 17 Wallace 329–333.

Judge Cooley thus states the principle:

"Some things are always presumptively exempted from the operation of general tax laws because it is reasonable to suppose they were not within the intent of the Legislature adopting them. A State may, if the Legislature see fit, tax all the property owned by its municipal divisions, but to do so would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed. It is always to be assumed that the general language of statutes is made use of with reference to taxable subjects, and the property of municipalities is not in any proper sense taxable. It is therefore by clear implication excluded. It is not, like government agencies, excluded from the power of tax laws, but it is beyond the grasp of their intent." Cooley on Taxation, pp. 130–131 and pp. 58–59.

The cases fully sustain the statement.

People v. Solomon, 51 Illinois 38, 52–53.

Trustees, etc. v. Champaign County, 76 Illinois 184.

Directors of Poor v. School Directors, 42 Penna. St. 21, 24–25.

State v. Gaffney, 34 New Jersey (5 Vroom) 131–133.

Gibson v. Howe, 37 Iowa 168.

Louisville v. Commonwealth, 1 Duvalls (Ky.) 295, 296–299.
Piper v. Singer, 4 Serg. and Rawle 354.
Doyle v. Austin, 47 California 353, 360–361.
Worcester County v. Worcester, 116 Mass. 193.

But aside from the exemption resulting from these general principles there was one resting on an express statute which declared as follows:

"That all the buildings and grounds owned by said city of Memphis and used exclusively for public purposes, such as fire companies, and fire engines, city water works, markets and market houses and their grounds, and such parts of the navy yard as are not leased to private parties, be and the same are hereby declared free and exempt from all State and county taxes so long as owned by the city and so used for public purposes." The act was passed and took effect 20th February, 1860. See Acts of Tennessee of 1859–1860, (private) ch. 70, sec. 9, p. 284, and sec. 38, p. 289.

As already stated, it is proven by the depositions of Foley, record pp. 31–33, and Sears, record pp. 42–44, that the lot in controversy was not leased prior to the lease to Mrs. Powers, which was on the 28th of February, 1866, and clearly the lot was not subject to direct taxes in the year 1861.

This special exemption was one which was expressly recognized by the language of section 13 of the act of Congress of August 5, 1861, 12 Statutes at Large, ch. 45, p. 297, already quoted.

## II.

The next and only remaining question is, whether the decree of 20th December, 1873, in the former suit, is in the way of Mrs. Powers obtaining in this suit the relief the facts established entitle her to. I shall contend that the effect of that decree is avoided as a bar to the present suit upon either of two theories, each of which is true.

(1)

The bill in the present suit is in effect to set aside the decree in the former suit for fraud or imposition, or both. In Story's Eq. Pl., sec. 426, the fourth class of bills is "bills impeaching decrees for fraud," which the author says are a sort of original bill in the nature of a bill of review. He continues: "There is no doubt of the jurisdiction of courts of equity to grant relief against a former decree where the same has been obtained by fraud and imposition; for these will infect judgments at law and decrees of all courts; but they annul the whole in the consideration of courts of equity. This must be done by an original bill; and there is no instance of its being done by petition; although it seems once to have been thought that a decree, as well as an interlocutory order, could be set aside for fraud by petition only. Where a decree has been so obtained the court will restore the parties to their former situation, whatever their rights may be. This kind of bill may be filed without leave of the court being first obtained for the purpose, the fraud used in obtaining the decree being the principal point in issue, and being necessary to be established by proof before the propriety of the decree can be investigated."

Instances of such bills may be seen in Kennedy v. Daly, 1 Schoale & Lefroy 355, 374–376; Barnesly v. Powel, 1

Vesey, Sr. 119; Mussell v. Morgan, 3 Brown's C. C. 79, and note. And see Merrill v. Humphrey, 24 Michigan 170.
2 Daniels' Ch. Pl. and Pr., (Cooper's Ed.) * p. 1584.

Or, if I am mistaken in the position that the present suit belongs to the class just mentioned, then I insist it belongs to that class of bills whose object is to suspend or avoid the operation of decrees, where, by reason of special circumstances of a peculiar nature, it is inequitable that the decrees should be allowed to stand, and yet there is no other designated mode of setting them aside.

Mitford's Eq. Pl. (by Jeremy) 94.
Story's Eq. Pl., secs. 388, 428 a.
Coker v. Bevis, 1 Chancery Cases 61.

The manner of proceeding, when the decree of December 29, 1873, was entered, has been already detailed and may be seen in the record at pp. 65–66, and perhaps it does not become me to characterize it, but I may be allowed to say it was wholly different from that ordinarily pursued in courts, which, according to Mr. Justice Blackstone, "are places wherein justice is judicially administered." 3 Blackstone's Com. * p. 23. On the occasion referred to, the judge presiding virtually abdicated his place, refusing to hear the case, though the parties were present and the plaintiffs in the suit insisted on presenting it to the court, and substantially devolved the duty of determining what decree should be entered in the suit upon the counsel of the defendants. The decree so entered was not the judicial act of the court, which necessarily presupposed the hearing of the pleadings and the proofs, and the arguments of the parties or their counsel, if they had any to offer. The decree was in effect the decision of Ensminger himself, who, through his counsel usurped the functions of and assumed to act as judge in his own suit.

It was a fundamental error to enter the decree without giving the plaintiffs an opportunity of presenting their case

and being heard through their counsel as to the merits o their cause.

McVeigh v. United States, 11 Wallace 259, 266–267.
Miller v. United States, 11 Wallace 268, 293–294.
Windsor v. McVeigh, 93 U. S. 274.

The syllabus of this last case uses this strong language: "A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights and is not entitled to respect in any other tribunal."

It was likewise erroneous to permit the entering of the decree, when by reason of the fact that the judge was wholly uninformed as to what the issues were and how they were supported by the proofs, such decree could not have the judicial sanction of the court.

Freeman on Judgments, sec. 2, and authorities there cited.
Cooley's Const. Lim. * p. 410, and cases cited.

And allowing the counsel of Ensminger to direct the decree that should be entered not only violated the maxim "*nemo debit esse judex in propria sua causa*," Broom's Legal Maxims * p. 111, but was a palpable disregard of the first principles of a free government.

Judge Cooley says, speaking of the maxim referred to:

"This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise. It is not left to the discretion of a judge, or to his sense of decency, to decide whether or not he shall act; all his powers are subject to this absolute limitation; and when his own rights are in question he has no authority to determine the cause."

Cooley's Const. Lim. * p. 411.

He even goes to the point of saying that "the Legislature can have no power to abolish a maxim which is among the fundamentals of judicial authority."

Ibid * p. 412.

And further, that he does not see how the objection can be waived.

Ibid * p. 413.

And finally: "If the objection is not taken before the decision is rendered, it will avail in an appellate court, and the suit may be there dismissed on that ground. The judge acting in such a case is not simply proceeding irregularly, but he is acting without jurisdiction. And if one of the judges, constituting a court, is disqualified on this ground the judgment will be void, even though the proper number may have concurred in the result, not reckoning the interested party."

Ibid * p. 413.

(2)

I submit, also, that the bill may be maintained as a bill of review only.

The bill and answer in the original suit, show that in the year 1861, when the direct tax accrued to the United States, and in the year 1864, when the sale by the direct tax commissioners was made, and between those dates, the title to the lot in controversy was in the city of Memphis, the same being a part of the Navy Yard. Record pp. 54, 60. The fact that the lot was part of the Navy Yard, is proved in the deposition of J. H. Humphreys (record p. 62–63), and by Sears' deposition (record p. 41), and Foley's deposition (record p. 31), and the description in the certificate of sale by the direct tax commissioners (record p. 62), taken in connection with the depositions of Humphreys (record p. 62) and of Sears (pp. 39, 44), both taken for the purpose of applying the description in the certificate to the ground in controversy, shows that the lot as sold by the direct tax

commissioners was a part of the Navy Yard, and the act of Congress of 5th August, 1854, 10 Statutes at Large, ch. 268, sec. 3, pp. 586–587, referred to in and made part of the bill in the original suit (record p. 54), shows the title was in the city of Memphis.

I shall not repeat the argument that the property of the city of Memphis was exempt from the direct tax to the United States of the year 1861, or 1862, if the latter is the proper designation as concerns the States which were in insurrection. But assuming that argument to be true, then I submit it was error of law, patent upon the face of the record, to decree that Ensminger by his purchase from the direct tax commissioners in June, 1864, acquired title to the lot in controversy.

As minor errors of law, patent upon the face of the record, I may point out that in the absence of any cross bill, or any prayer in the answer for affirmative relief, the decree of 20th December, 1873, (record pp. 63–64, 66–67,) declared the title of Ensminger to the lot in controversy to be good, and awarded a writ of possession to put him in possession of it. That this was error, see Story's Eq. Pl., sec. 398a; 2 Daniel's Ch. Pl. and Pr., *p. 1550, and note 2.

The decree also directed a reference for an account of the damages sustained by Ensminger by reason of the suing out of the injunction awarded and issued on the filing of the bill. This I understand to have been contrary to the rule laid down in Bein v. Heath, 12 Howard 168. The court below ultimately took this view, as it refused to give a decree for the damages reported. Record pp. 88–89.

No replication had been filed to the answer when the cause was heard, as required by rule 66 of the rules in equity.

After the cause had been docketed and dismissed in this court under the 9th rule, and had been remanded for the

execution of the decree of 20th December, 1873, (record p. 70, and pp. 66–67,) the circuit court, instead of proceeding to execute that decree, pronounced another decree, which, while it renewed the order of reference contained in the decree of 20th December, 1873, embraced an entirely new feature, to-wit: "to report what damages have been sustained by said defendants by reason of the loss of rents and profits of the land described in the pleadings." Record p. 70. To show that this was error, I refer to—

Skillen's Ex'rs v. May's Ex'rs, 6 Cranch 267.
West v. Brashear, 14 Peters 51.
Chaires v. U. S., 3 Howard 611.
Exparte Dubuque and Pacific R.R Co., 1 Wallace 69.
Supervisors v. Kennicott, 94 U. S. 498, 499.

The error of fact assigned in the bill as the ground for reviewing and reversing the former decree, was that while Bridget Powers was a married woman when the first bill was filed, and when the decree of 20th December, 1873, was rendered, and has continued so till now, her husband, John C. Powers, was neither a plaintiff nor a defendant in the suit. The bill states that Mr. and Mrs. Powers were married on the 14th September, 1862. Record pp. 1–2. The answer, no doubt, intended to admit the statement, but, by mistake probably, states the marriage to have been on the 14th September, 1874. Record p. 25. Foley's deposition fixes the date of the marriage "before the house and improvements on the lot mentioned above were put there." Record p. 32. That of course was before the bill was filed. And the bill was sworn to by John C. Powers as agent for Bridget Powers, (record pp. 56–57,) while the acknowledgment of Mrs. Bridget Powers to the lease entered into between her and the city of Memphis, taken by the clerk of the county court of Shelby county, on the 2d October, 1866, (record pp. 15–16,) describes her as wife of John C. Powers. While, as just shown, Mrs. Powers was a married woman when the bill was filed, the fact did not appear in the bill,

or anywhere in the record of the original suit prior to the decree of 20th December, 1873.

That it is necessary that the husband should be a party to a suit brought by his wife will not, I presume, be denied.

Story's Eq. Pl., sec. 61.

The only question is, what is the effect upon a decree of omitting the husband as a party in a suit of the wife where he should have been a party? The want of proper parties is laid down as a good ground for filing a bill of review.

Mitford's Eq. Pl., p. 92.

In Alexander v. Slavens, 7 Ben Monroe 351, 355–356, it is said that "the want of proper parties is a sufficient cause for a bill of review, where it appears from the record that persons substantially interested in the result were not made parties."

In Story's Eq. Pl. sec. 427, it is said that a decree obtained without making those persons parties to the suit in which it is had whose rights are affected thereby is fraudulent and void as to those parties. And see

Cooper's Eq. Pl., p. 98.
Giffard v. Hort, 1 Schoale & Lefroy 386.

The principle has been extended to improper decrees against infants, although not gained by fraud, or by collusion or surprise. Such decrees may be impeached by original bill.

Story's Eq. Pl., sec. 427.

No one can sue for a married woman as her next friend without her consent.

Gambee v. Atlee, 2 DeGex and Smale 745.
Story's Eq. Pl., sec. 61.

And a suit brought by her husband in his and her names is his suit only, and will not absolutely bind her.

Story's Eq. Pl., sec. 61.
Grant v. VanSchoonhoven, 9 Paige Ch. 255.

Mr. Daniel says where a married woman having separate estate joins as a coplaintiff with her husband, instead of suing by her next friend, the suit will not prejudice a future claim by the wife in respect of her separate interest.

1 Daniel's Ch. Pl. and Pr., * p. 108–109 and cases cited.

Consistently with these principles the decree of 20th of December, 1873, did not conclude Mrs. Powers, and if it did not, I can conceive of no reason why she could not obtain relief from it by the present bill. While I am aware of the rule that the "nonjoinder of a party is not ground for a review, unless the complainant sustained some injury thereby," Whiting v. Bank U. S., 13 Peters 6, 14, yet, as Mrs. Powers was by law incapable of suing alone and the record of the original suit clearly shows that her rights have been seriously impaired by the proceedings which have been had, I submit the nonjoinder of her husband as a party to the original suit, the error complained of here, does not come within that rule.

Possibly I might maintain the position that Mrs. Powers could disregard the decree of the 20th of December, 1873, and successfully assert against its effect upon her rights the mere fact of her coverture. Such is the doctrine in Missouri, Maryland and Massachusetts, and possibly in Pennsylvania.

Griffith v. Clarke, 18 Maryland 457.
Higgins v. Peltzer, 49 Missouri 152.
Swayne v. Lyon, 67 Penna. St. 436.
Morse v. Toppan, 3 Gray 411.

But whether I could maintain, on behalf of Mrs. Powers, the position just stated, or not, I submit there is no doubt that the decree against her alone was erroneous, and may be corrected in a direct proceeding instituted by her and her husband, as by a bill of review.

Freeman on Judgments, sec. 150, and cases referred to.

Besides, the interest held by Mrs. Powers in the lot was a leasehold for twenty years. It was a chattel real, and possibly belonged to her husband, John C. Powers. He was not a party to the original suit, and whatever may be said as to Mrs. Powers, he certainly was not bound by the decree of 20th December, 1873. As to him, the decree was void, and under the general doctrine, recognized in Gaines v. Fuentes, 92 U. S. 10, 20–21, he had the right to file the present bill, not only for the purpose of restraining the enforcement of the decree pronounced against his wife and the city of Memphis, but to cancel the certificate of purchase granted Ensminger by the direct tax commissioners, and to have the sale declared void. Whether the bill in this view ought to be called original, or original in the nature of a bill of review, or a bill of review only, or ought to be regarded as combining any or all these features, is perhaps not material.

As a bill of review for error of law, the plaintiffs had the right to file it without the leave of the court.

Winchester v. Winchester, 1 Head 460, 481–483.
Davis v. Speiden, 104 U. S. 83, 86.

But the court did in fact give the leave to file the bill.

Record p. 22.

And that all the matters of the bill could be combined in one suit, and that the bill is not multifarious. See

Whiting v. Bk. U. S., 13 Peters 6.
Perry v. Phelips, 17 Vesey Jr. 173.

WM. M. RANDOLPH,
*Of Counsel for John C. Powers and Wife.*

MEMPHIS, December 12, 1882.